

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921

No. 164

UNITED ZINC AND CHEMICAL COMPANY, PETITIONER,

vs.

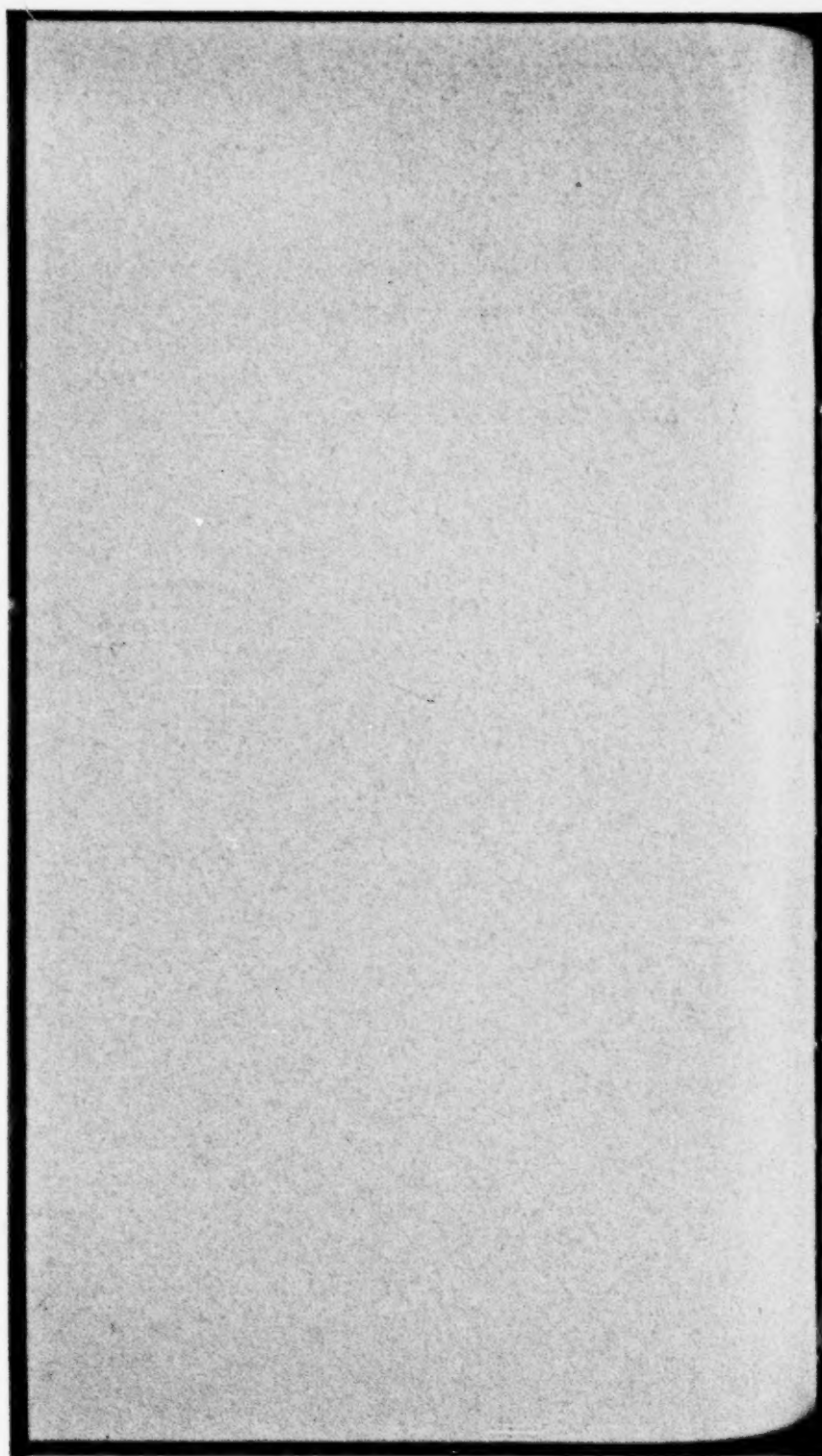
VAN BRITT AND SUSIE BRITT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 30, 1920.

CERTIORARI AND RETURN FILED DECEMBER 17, 1920.

(27,960)



(27,960)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 603.

UNITED ZINC AND CHEMICAL COMPANY, PETITIONER,

vs.

VAN BRITT AND SUSIE BRITT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

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Vol. 1.

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1918, of said Court, before the Honorable Walter H. Sanborn and the Honorable John E. Carland, Circuit Judges, and the Honorable Thomas C. Munger, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States
Circuit Court of Appeals for
the Eighth Circuit.*

Be it Remembered that heretofore, to wit: on the twenty-second day of August, A. D. 1918, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the District of Kansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein The United Zinc and Chemical Company was Plaintiff in Error, and Van Britt, et al., were Defendants in Error, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of the Act of Congress approved February 13, 1911, is in the words and figures following, to wit:

Citation.

UNITED STATES OF AMERICA, ss:

To Van Britt and Susie Britt, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty (60) days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Kansas, Third Division, wherein The United Zinc and Chemical Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John C. Pollock, Judge of the United States District Court for the District of Kansas, Third Division, this 18th day of June, A. D. 1918.

JOHN C. POLLOCK,
Judge.

UNITED STATES OF AMERICA:

In the District Court of United States, District of Kansas, Third Division.

We hereby acknowledge service of the within citation this 19th day of June, A. D. 1918.

F. J. OYLER AND
FRED ROBERTSON,
Attorneys for Defendants in Error.

Filed in District Court June 18, 1918.

*Writ of Error.*UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the Honorable Judge of the District Court of the United States for the Third Division of the Judicial District of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the May Term, 1918, thereof, between Van Britt and Susie Britt, of Springfield, Missouri, plaintiffs, vs. The United Zinc & Chemical Company, a manifest error hath happened, to the great damage of the said The United Zinc & Chemical Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that

then, under your seal distinctly and openly, you send the
1 record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the 17th day of August, 1918, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 18th day of June, in the year of our Lord one thousand nine hundred and eighteen.

Issued at office in the City of Fort Scott, with the seal of the Dis-

trict Court of the United States for the Third Division of the Judicial District of Kansas, dated as aforesaid.

[SEAL.]

FRANK L. CAMPBELL,

*Clerk District Court United States,
Third Division of the Judicial District of Kansas.*

Approved by

JOHN C. POLLOCK,

Judge.

By C. N. PRICE,

Deputy Clerk.

Filed in District Court June 20, 1918.

Notice of Election to File Printed Transcript.

To Frank L. Campbell, Esq., Clerk:

The defendant in the above entitled cause, having sued out a writ of error to review a final judgment heretofore rendered in the above case, hereby notified you of its election to take and file in the United States Circuit Court of Appeals, Eighth Circuit, a transcript of the record or of the part thereof requisite for the hearing of this case in that court, such transcript to be printed under your supervision as clerk of said District Court pursuant to the provisions of the act entitled, "An Act to diminish the expenses of proceedings on appeal and writ of error or of certiorari," approved February 13, 1911.

ASHLEY & GILBERT,

Attorneys for Plaintiff in Error.

Filed in District Court June 25, 1918.

Petition.

In the District Court of Allen County, Kansas.

No. 10993.

VAN BRITT and SUSIE BRITT, Plaintiffs,

vs.

THE UNITED ZINC & CHEMICAL COMPANY, Defendant

Petition.

I.

Plaintiffs for their cause of action against the defendant allege that they are and at all the times herein mentioned were husband and wife; that they are resident citizens of

Springfield, Missouri, and their correct postoffice address is Springfield, Missouri. That the defendant at all the times herein mentioned was a corporation duly organized under the laws of the state of New Jersey, and owning real estate near the city of Iola, Allen County, Kansas, described as follows, to wit: Beginning at a point 860 feet east of the southwest corner of the Southwest Quarter of Section 25, Township 24, Range 18, thence north 445 feet, thence west 200 feet, thence north 599 feet, thence east 888 feet, thence south 1044 feet, thence west 688 feet to the place of beginning, Allen County, Kansas; upon which land defendant maintained a zinc smelting plant and where it manufactured zinc spelter and sulphuric acid. That it maintained its plant upon the land above described from about 1902 to 1911, or thereabouts, the exact date plaintiff does not know and cannot set out herein.

II.

That along about the latter date, defendant discontinued its business aforesaid, and removed the greater portion of its buildings and all its machinery from said place, but still owns and has on said property a brick building about 75 by 150 feet, and east of said building about 300 feet it has maintained a pool of poisonous water, 43 feet wide by 100 feet long. That said place is walled with brick and used for the purpose of running its waste and overflow water in, which they used in the manufacture of its spelter and sulphuric acid.

III.

That in the manufacture of spelter and sulphuric acid, defendant company used accostic potash, and that accostic potash and sulphuric acid are deadly poisons; and that the water in said pool, aforesaid, contained other deadly poisons, the exact amount or kinds plaintiffs do not know and cannot set out herein. That said water was perfectly clear and apparently wholesome and pure.

IV.

That when defendant removed its buildings from said place, it wantonly, willfully, carelessly and negligently failed to fill up said pool of poisonous water, or in any manner enclose the same, or erect any barriers, danger signals, signs or warnings to warn persons or children from playing, bathing or swimming therein, or using or drinking said water; and the water in said pool at the times hereinafter mentioned was about three feet deep, except one place it was about seven or eight feet deep; and the water therein being perfectly clear, as aforesaid, was an attractive and inviting place for children of immature years to gather, congregate, enter, bathe and play; and because of its being so perfectly clear and crystal like in appearance, its poisonous condition could not be detected by anyone observing it, but only by coming in actual contact therewith.

V.

Plaintiffs allege that said water was so poisoned with sulphuric acid and accostic potash, and other poisons aforesaid, that a person going into or coming in contact with it, or tasting or drinking it, or in any manner getting any of it in their mouth, or swallowing it, would cause almost instant death. That it contained sufficient amount of deadly poisons that when it came in contact with human flesh it would burn and blister it.

VI.

Plaintiffs further allege that Edward and Allen Britt were their sons, and were eight and ten years old respectively. That on or about the 27th day of July, 1916, they and their four children, including their sons above named, came to Iola in a covered wagon, and camped, or left their wagon and team just east of Iola and probably within a couple of hundred yards of the pool of poison water aforesaid. That plaintiffs and their sons were total strangers in the city of Iola and surrounding country, and had no knowledge that a zinc and acid plant had ever been operated on the ground aforesaid. And at all the times herein mentioned plaintiffs had no knowledge that a pool of water existed at said place, and that neither they nor their sons Edward or Allen, had any knowledge or notice at the times hereinafter mentioned that said water contained any poisonous substance whatever, or that it was a dangerous and unsafe place.

VII.

Plaintiffs further allege that on the afternoon of July 28th, 1916, which was a very hot, dry and sultry afternoon, their sons, Edward and Allen, were playing near said pool of poison water, when they discovered it contained very clear and apparently wholesome, cool pure water, and from all appearance was a perfectly safe place to enter and bathe; and their son Edward Britt undressed and entered said water for the purpose of bathing, when the poison contained in said water overcame him and so poisoned him that he lost control of himself and was unable to regain the bank and died almost instantly as a direct result of the deadly poisons contained in said water.

VIII.

That the said defendant's officers, agents, servants and employees, whose names are unknown to plaintiffs, well knew that the water in said pool contained deadly poisons, as aforesaid, that if anyone entered therein, it would cause immediate death, and they had full knowledge of its dangerous and unsafe condition, or could have had such knowledge by the exercise of ordinary care and prudence on their part; but carelessly, negligently, wantonly and willfully left the same open and exposed without any

railings, barriers, danger signals or warnings of any kind to warn persons or children of its being a dangerous and unsafe place to enter, or to prevent persons or children from falling or going therein; and plaintiffs allege that defendant had wantonly and willfully, carelessly and negligently permitted said pool of poisonous water to remain in said condition for about five years prior to July 28th, 1916, as aforesaid.

IX.

Plaintiffs further allege that their said son Edward Britt was a strong and healthy boy, was kind, loving and obedient and a great help, aid and comfort to plaintiffs, and that they have lost his help, aid and comfort during his minority or a period of thirteen years to their great detriment and damage in the sum of \$10,000.

Second Cause of Action.

I.

Plaintiffs for their further and second cause of action against the defendants, hereby replead all the allegations of their first cause of action, make the same a part hereof as if literally transcribed and set out herein and say: that at the time aforesaid, to-wit: the afternoon of July 28th, 1916, their son Allen Britt, ten years of age, as aforesaid, saw the condition of his brother Edward after he had gone into said pool of poisonous water, and observing his perilous and dangerous condition, and that he was unable to reach the bank, and after he saw him go down under the water, and observing the great danger he was in, jumped into said pool of poisonous water in the endeavor and attempt to aid, rescue and save his brother from death, and in his attempt to do so, he too was overcome by the poisons in said water, the same having entered his eyes, nose and mouth, and he became strangled and some of the poisonous water entered his stomach, and he immediately became sick as a direct result thereof and died the next day, July 29th, 1916, as a direct result of coming in contact with the poisonous water in said pool in the manner aforesaid.

II.

Plaintiffs further say that their son Allen Britt was a strong healthy boy, and was a loving, kind and obedient son, and rendered great help, aid, assistance and comfort to them. That he had been earning about \$30.00 to \$35.00 per month prior to his death, which money he gave to plaintiffs; and that they have been deprived of his help, aid, assistance and comfort during his minority, or a period of eleven years; and that by reason of his death they have been damaged in the sum of \$10,000.

III.

Wherefore, Plaintiffs pray judgment against said defendant Company on their first cause of action in the sum of \$10,000, and a further judgment on their second cause of action for \$10,000, in the total sum of \$20,000; and for costs of suit.

F. J. OYLER,
Attorney for Plaintiffs.

Filed in District Court of Allen County, Kansas, Aug. 11, 1916.
Filed in U. S. District Court April 20, 1917.

In the District Court of the United States for the District of Kansas,
Third Division.

No. 289.

VAN BRITT and SUSIE BRITT, Plaintiffs,

vs.

THE UNITED ZINC & CHEMICAL COMPANY, Defendant.

Answer.

Comes now the defendant the United Zinc and Chemical Company, and for answer herein alleges:

1st. That it was, at the time mentioned in plaintiffs' petition, and still is, a corporation organized under the laws of the State of New Jersey; that it was, at the times mentioned in plaintiffs' petition, the owner of the real estate in Allen County, Kansas, near the City of Iola, described in plaintiffs' petition; that from the year 1902 up to the month of September, 1910, it maintained on a part of said real estate a factory where it manufactured zinc spelter and sulphuric acid; and that some time in September, 1910, it ceased manufacturing at said factory, removed its machinery, and tore down its buildings thereon excepting one brick building mentioned in plaintiffs' petition.

2nd. Further answering, that except as hereinabove specifically admitted, it denies each and every allegation in plaintiffs' said petition contained and in each and every alleged cause of action therein stated and numbered.

Wherefore, having fully answered, this defendant prays to go hence with its costs.

BAXTER D. McCLAIN,
ASHLEY & GILBERT,
Attorneys for Defendant.

Filed in U. S. District Court, Nov. 24, 1917.

Statement on Behalf of Plaintiffs.

(By Mr. Oyler:) May it please the court, and gentlemen of the jury:

From the brief statement made by Mr. Robertson you of course understand something about this case. It now becomes my duty, as one of the attorneys for the plaintiffs, to state to you what the facts are, and upon what facts the plaintiffs will rely for recovery in this case against the defendant. I might here say that the issues in this case have been somewhat narrowed by reason of the pleadings and the admissions of the defendant in its answer, and I will refer to that later.

6 The defendant is a corporation, organized under the laws of the State of New Jersey. From about 1902 until 1910, in September of that year, they operated what was known as the zinc plant, and a sulphuric acid plant in connection with the zinc plant. The acid plant, however, was located just east of the smelter building, about three hundred feet I think the testimony will disclose. This plant was perhaps in charge of different officials or foremen or superintendents from the smelter plant. They moved their machinery away and tore down all the buildings except one, I think, during the year 1911. Where they had manufactured sulphuric acid they left a basement, the exact dimensions being forty by ninety-four feet. This basement had been walled up with brick or rock. In the center of this basement, where they had at one time had boilers or engines or sulphuric tanks, in the center was deeper than it was at the outer edges; at the outer edges the water at the time in question was about two or two and one-half feet deep. The floor of the bottom was of brick; in the center pit which I call your attention to, which the testimony will show was about twenty by forty feet, that was much deeper than the other. The bottom of that was of cement or concrete.

In July, 1916, about the 27th or 28th, the plaintiff, one of the plaintiffs, Mr. Van Britt, who is sitting there, together with his wife and four children, had traveled in a wagon from Springfield, Missouri, their home, to western Kansas, I think to Great Bend. He had a brother living at Council Grove and they stopped there on a visit. They went out into western Kansas to work in a harvest field. They had two little boys, one eight and the other eleven. After being in western Kansas a while they started back home to Springfield, Missouri, and he has a brother living in Iowa. I don't know that he has a brother living there, I don't know his name, never met him that I know of; he stopped there for a visit. The defendant's plant had been situated just east of Iowa, just outside of the corporate limits, and as they returned on their way home they stopped in the east part of town and camped just south of the railroad tracks south of where the smelter had been located. Mr. Britt's brother lived up north of the tracks I think on North Fourth Street in a little brick house there. Just west of where this pool or pond of water which I will call your attention to more

definitely later, there was a road running north and south, not a laid out road, but a road that had been made by the defendant company and its employes just west of what is known as Clayborne's mill. A crossing was made over the two tracks, the interurban track running from Iola to La Harpe, and also the track that runs from the Missouri Pacific out to the Prime Western Smelter Company, that runs north of the Clayborne mill. Across both of these tracks

7 was a crossing where people drove with wagons or automobiles or whatever they wanted to, and this road is about one hundred and twenty feet west of the pool of water in question.

When the defendant moved its machinery away from this place, and its sulphuric acid towers, the testimony will disclose the manner in which this was made, and what they had this machinery there for. They left in this pit the testimony will show about one hundred and fifty or two hundred barrels of sulphuric acid, some caustic potash—and other different chemicals that they used there, was dumped into this pit and left there; the buildings were all taken away and the place was left open. The defendant never built any fence around this place, no barriers of any kind; never put up any signals or warnings as to the sulphuric acid being in there, or that it was a dangerous place. Now after the buildings had been moved away it rained in there and this part filled up with water. And it remained in this condition for the last six or seven years, from the time it was moved away finally in 1911 until the time in question when these little boys went in and lost their lives.

Now the facts will show that after Mr. Britt and his wife had camped there these little boys went up to visit his brother on Fourth Street; as they were returning they came back by this pool of water, and the testimony will show that the water was perfectly clear, perfectly clear; there was nothing to show that there was any poison in there, or that if the boys or any one else would go in they would suffer any harm or injury by reason of that. The water was perfectly clear, and the testimony will show, by reason of the sulphuric acid and potash, &c., being in there, that would tend to clarify it and cause all other matter to settle to the bottom and leave the water perfectly clear. These little boys came along there, the testimony will show, one of them went in; the water was shallow at the edge of the place and he went in and waded out; he finally got in deeper; the testimony will show when he got into the deep place he was overcome and immediately went to the bottom. The testimony will show that these two boys could swim, both of them could swim. The youngest was eight years old, he could swim enough to protect himself in deep water, but the older boy could swim very well. The testimony will show his father had been in water with them several times, and they could both swim. That directly after the little boy, the youngest one, went down, the older boy hurried in after him and he was overcome. The other little boy there with them, which was a cousin of theirs, gave the alarm to some men working with the Kaw Paving Company some two or three hundred yards southwest of the pond; the men went over there; the testimony will show a man by the name of J. M. Brown went into the

water and that he was almost overcome by the poisonous condition of the water; then a young man by the name of Ernest Dalton also went in and he was almost overcome by the poisonous condition of the water; another young man by the name of Jake Lee went in and he was injured by this water. The testimony will show the oldest boy was taken out alive; he was able to flounder around and he was taken out alive but the next day he died as a result of coming in contact with this poisonous water. The other little boy was dead practically when they took him out. I think the testimony will show he lived perhaps some little time and that the fire chief, a Mr. Creason, who went with the pulmotor was sent for; that he used the pulmotor for perhaps an hour, an hour and a quarter on the little boy, and that he did breathe and have life at the time, but he died. Now the facts will further disclose that when Mr. Creason went to use the pulmotor on the little boy taken out there for dead, his lips were burned, his tongue was sort of burned to a crisp, and he could hardly use the pulmotor because of those conditions. That he found that spots were burned on his body to a blister, and you could take your finger and rub the skin or flesh off where this stuff had burnt him. When the water came out of his mouth in using the pulmotor that it blistered his lips where the water ran down on each side. The testimony will show the older little boy was taken to the sanitarium and lived until the next morning. Vomited, became very sick, suffering intensely, suffered the most excruciating pain by reason of having swallowed some of this water, and that he died as the direct result of getting some of this poisonous water or swallowing it, or getting it into his throat, that it affected his lungs, destroyed the mucous membrane, and caused his death by reason of coming in contact with this water and swallowing it. We will show that beyond any question of a doubt. We will also show to you this water was left there in this condition, and that sulphuric acid left in this pit, with the knowledge of the representative and foreman of this defendant company when it was left there. I think the testimony will show a gentleman by the name of Freible was there at the time as superintendent of the acid plant when the plant was torn down and the acid poured in there. It will also be shown after Mr. Freible left the man who succeeded him was a man by the name of Simmons, as foreman, and he was there until the last particle of the property belonging to the defendant company was removed and he also knew this acid had been poured in this pit.

A photograph of this pool of water will be introduced in testimony showing to you gentlemen of the jury that it was a very attractive place, especially on a hot summer day. The testimony will also show by witnesses who have passed it day after day going and from work, that it was a very attractive place not only to children but for people of mature judgment if they didn't know its condition.

The testimony will further disclose that two other little boys went into this pool one day some time before this, not knowing the poisonous condition of the water but they only stepped into the shallow places and their feet immediately commenced to smart and burn and they got out and went home and told the doctor and their parents and no great harm came to them, but that it contained a poison. The testimony will show Doctor took a sample of this water home after these children were buried on Sunday, and it was sent to the State University of Kansas and Professor Bailey, a well known chemist, made an analysis to ascertain the poisons that were in this water, and Professor Bailey is here and will testify before you gentlemen as to what his analysis disclosed as to the poisonous condition of this water.

Now, if we show this statement of facts to you gentlemen of the jury, that the defendant left this pool of water there without any warnings or signals, and that it contained this poison; that it was an attractive place, and these little boys went in there and lost their lives by reason of it, the plaintiffs will be entitled to recover a judgment against the defendant.

Mr. Robertson calls my attention to another thing, and I am glad he did for I had overlooked it. The testimony will show one of these little boys, the one eleven years old, was able to work and earn money; had worked out this summer on this trip and had earned a dollar a day or at different times more than a dollar a day. He was well acquainted with horses; knew how to handle horses. His father is a man who buys and sells and trades horses, and that the boy had worked for different parties the summer in question and earned good wages. That they were very dutiful children, the younger boy helping his mother at whatever she might want him to do; and they were both healthy and strong and bright and intelligent. They had gone to school, the testimony will show the oldest boy was in the fourth or fifth grade and the youngest boy was in the third grade, and that they were very helpful to their parents.

Now then, as I stated, the issues in this case have been somewhat narrowed down in this case by the answer filed by the defendant; in other words, they admit they are a corporation and were at the times in question; they admit they own the land where this pool was situated; and they admit they removed their machinery, as we plead in our petition, except one building, a brick building that was left there and torn down shortly after this accident occurred. But I might suggest another thing; after these little children lost their lives by reason of going into the pool, the defendant filled up this pond and it is now practically full of dirt and trash and other things that have been put in there by the defendant since the loss of these children's lives. I believe that is all the facts, so far as I can now think of them. Many things will come up in the testimony which I have not been able to recall just now, but after you have heard all the facts in the case we think the plaintiff will be entitled to recover a substantial sum at your hands for the loss of these children.

Statement of the Case by Defendant.

(By Mr. Ashley.) May it please the court, and gentlemen of the Jury:

It is true, the defendant company admits the ownership of the land, but as you have learned from Mr. Oyler's statement, the plant which was a plant for the manufacture of sulphuric acid, was operated from 1902 until 1910, when, it being no longer profitable, presumably, to operate it, it was abandoned.

I am not going to consume your time with a lengthy statement except to correct a few misstatements in regard to the character of the plant, that manufactured sulphuric acid, as some of you know, from the fumes of ore which they had roasted in one of these Hegler furnaces. This collection of water, which they allege was the cause of the death of these children, had collected, there will be no dispute about that, in the basement of what had been the tower building of that plant. In making sulphuric acid you have got to start with some acid before you make anything, and from that as a sort of starter gain a circulation of the fumes and acid through towers and through chambers. The tower building had in its basement two or three acid eggs which are really pumps; that is to say, they are shaped like a large egg and from the boiler house air pressure forced the acid into the egg up into the tower. When the plant was dismantled in 1910 all machinery in the plant was removed, the acid eggs were taken out of the basement of this tower building, where surface water afterwards collected, and shipped sealed up from there to Argentine. The evidence will show that when Mr. Freible, who was the superintendent of the plant, and whom we have brought here from Hillsboro, Illinois, where he now is, that the basement of the former tower building was left practically dry; that there was a sewer in it which carried off the water. That was in 1910, gentlemen. This company was unfortunate enough to continue to own this land and pay taxes on it, and has owned it from that day to this, but you are asked to hold the company liable, or, rather, to give the parents some financial reward or compensation for the death of their two children which occurred about July 27, 1916, six years after the company had done anything except to be the owner of that piece of vacant property near Iola.

Now I say that there will be no dispute but that the water—some water, had collected in the basement of this old tower building. The evidence will show you that in September 1915, the sad death of these children having occurred in the summer following, it will be shown in evidence that there was almost a flood, pretty near a down-pour, very heavy down-pour of rain in Iola, and if there are any men on this jury from Iola they will know that to be a fact. The surface water then from that flood, or from some other cause, collected in the basement of this building and did not run out.

11 The gentleman will not, I think, be able to prove, although he stated it, that one hundred and fifty barrels, or some number of barrels of acid were left in that basement. The evidence was

show the circulation through that basement, through the acid egg and through some water tanks through which coils ran for the purpose of the water—being to cool the acid as it circulated up into these towers, was all tight; that they didn't waste anything because it was against their selfish interests, among other things; they were making a valuable product, they didn't want to waste it; nothing was wasted. The acid eggs, during its entire operation, were dry. There was a sewer which carried off what water, if any, accumulated, and in addition to that it will be shown in evidence when they left there and had taken out of there the acid eggs, which were pumps in fact because by air they forced it up, and taken out the tanks that surrounded the coils, and taken out the coils, that what they left there was the dry foundation of an abandoned or dismantled building.

Now, gentlemen, this plant was east of Iola with railroad tracks about it, and if any of you know the neighborhood you know something about the kind of territory. The accident happened to these children, at least they died; why, it is not our burden to explain. We will not yield to any one in sorrow at their death, but the question you will have to determine is, under your oaths, as jurors. Of course, any money you gave the parents wouldn't bring them back their children, should you give them money and take it from this company, because their death happened on land upon which the company had formerly operated a sulphuric acid and zinc smelter plant, after six years, providing the company, as the evidence will show, left, after dismantling their plant, left the premises in such shape that no such disaster or calamity as befell these children could have possibly happened unless it happened as disasters will happen to all of us, and they are no less pathetic because they are frequent, whether or not it is the loss of child, or wife, or whatever it may be. At any rate, there is no reason why this corporation, or no duty that it owed to these children, or the parents of these children, which it did not perform——(interrupted)

Mr. Oyler: If the court please, we object to this argument, because it is not a statement of facts.

The Court: I think it is proper.

(Mr. Ashley, continuing:) people we owed no duty, and therefore, under your oaths, notwithstanding your intense sympathy which you will have for these parents, there is no reason, under the instructions as the court may give them to you, why you should take any of the money of the defendant and pay it to the parents of these little boys.

12 Mr. Ashley: If the Court please, at this time we wish to urge a former demurrer, on the ground the petition does not state facts sufficient to constitute a cause of action, and the plaintiffs' legal capacity.

The Court: I have ruled those questions.

Thereupon, the plaintiffs, to maintain the issues upon their part, produce and offer testimony, as follows:

GEORGE W. LEE, called as a witness on behalf of the plaintiff, having been first duly sworn, testifies, as follows:

Direct examination.

Questions by Mr. Oyler:

Q. State your name in full?

A. George W. Lee.

Q. Where do you live?

A. I live in Iola, Kansas.

Q. How long have you lived at Iola, Kansas?

A. Twelve years.

Q. What business are you engaged in now?

A. Engineer Prime Western Smelter Company.

Q. How long have you been employed by the Prime Western Smelter Company?

A. First and last been employed sixteen years.

Q. How long have you been engineer of the place where you now work?

A. Since last August.

Q. You are engineer at their pumping station?

A. Engineer at the pumping station.

Q. North of Iola?

A. Yes sir. Two miles north of Iola.

Q. Did you ever work for the defendant the United Zinc and Chemical Company?

A. Yes sir.

Q. What time did you work for them?

A. It was in 1910, began there in April 1910.

Q. How long did you work for them?

A. Well I worked for them till in November I reckon 1910.

Q. When did they quit operating their plant there?

A. Well, in September some time, I don't know just what time.

Q. What did they manufacture or make?

A. They manufactured sulphuric acid and zinc.

Q. What part of the plant was you employed in?

A. I was employed in the yards principally.

Q. The yard?

A. Yes.

Q. After they quit operating their plant in September 1910 as you have stated, did they dismantle or remove a portion of their buildings or machinery?

A. Yes sir, they removed all of it.

Q. Did you continue to work for them until it was all moved?

A. No, not quite all of it, part of the furnace buildings there when I left.

13 Q. That was the building west of the sulphuric acid plant?

A. Yes.

Q. That was removed only recently in the last year?

A. Yes, part of it there yet, some of the brick building.

Q. Did you work around or near the acid plant when you were employed there?

A. Yes I was all around it.

Q. Were you there when the machinery and towers and tanks were taken away by the defendant?

A. Yes.

Q. Did you help do that as a laborer?

A. I helped with the machinery and the pipes, I didn't help take down the towers.

Q. You helped with the machinery and pipes?

A. Yes.

Q. Didn't help with what?

A. Helped take down the machinery and pipes.

Q. You didn't help with what?

A. Didn't help take down the tower building.

Q. The tower building?

A. Yes.

Q. Did you help to take down the towers that were in the acid part?

A. No sir, I didn't help take those down.

Q. Now, do you know when those were taken down?

A. They were taken down some time along in October, somewhere along there, I don't mind just what time, along there some place.

Mr. Ashley: 1910?

A. 1910.

By Mr. Oyler:

Q. You may state while you was helping or assisting to dismantle these buildings and remove this machinery who was the foreman or superintendent, if you know?

A. Well there were different ones, Mr. Chris Ermal was one.

Q. Chris who?

A. Chris Ermal, and Dick Freible, was another one.

Q. Who was the last foreman or representative of the company there?

A. John Simmons.

Q. Did you work under Mr. Simmons a while?

A. Yes.

Q. Was he the last man that was there for the defendant company when all the machinery and stuff was taken away?

A. So far as I know he was.

Q. When this machinery and stuff was being moved away, or the buildings being torn down as you have stated, you may tell the jury whether or not any sulphuric acid was poured into that pit where these towers and machinery was?

A. Yes sir, it was.

Mr. McClain: If the Court please, defendant objects for the reason the witness has not qualified himself to testify.

The Court: If he knows.

Q. Do you know whether there was or not?

A. Yes sir, I saw it poured in there.

14 Mr. Ashley: If the court please, we object for the further reason he stated he was not there when the tower building was dismantled.

The Court: He says he was there when this was poured in; go ahead.

Q. Tell the jury how it was poured in, state the facts?

A. It was poured in by taking those tiles in and emptying them into the pit, take the tiles down and empty it in there.

Q. What do you mean by tiles?

A. Well, it was four square tiles that run through this building.

Q. You mean through the building that stood north of this zinc pit?

A. Yes sir, right north of that zinc pit, goes down in there.

Q. What was that building for?

A. Well, that was for the acid.

Q. That where they made the acid?

A. That tower building, yes sir.

Q. Now have you an opinion from working around there, the size of this pit or place where the sulphuric acid was made?

Mr. McClain: If the court please, the defendant objects to that.

The Court: I suppose you have much better evidence than that?

Mr. Oyler: Yes, but I wanted to get the dimensions of this place if I could.

A. I couldn't give the correct dimensions.

The Court: There ought to be no dispute between you on that question at all, ought to be able to have the exact measurement.

Mr. Oyler: We have it, but I thought to fix it.

The Court: State it, you can prove it afterwards.

Mr. Oyler: The exact size is forty by ninety-four, the outside, the inside is twenty by forty; that is what our testimony will show.

Q. Now was there a place in the center of this pit that was deeper than the rest of it?

A. Yes.

Q. About how deep was the center?

A. I don't know just how deep the center could have been, but the place was about eight or ten feet square, those pits, in the center.

Q. You mean the different pits where the boilers set?

A. Yes.

Q. You say they are about eight or ten feet square?

A. Yes.

Q. About how deep?

A. I couldn't say.

15 Q. When this acid was poured in there, tell the jury how near it came to filling those different pits?

A. It filled those pits up full, and other stuff that was throwed in there with it.

Q. Other stuff, what do you mean, chemicals?

A. Chemicals, yes sir.

Q. From what were they poured out of?

A. Poured out of barrels, put in barrels and poured down in there.

Q. Were those chemicals and stuff used there with which they manufactured sulphuric acid?

A. Yes sir, what they used in manufacturing it.

Q. You are not undertaking to say you understand what they all were?

A. No sir I couldn't say.

Q. Did you ever work around the sulphuric acid?

A. Not to amount to anything, only to take it out of the pipes.

Q. When it was poured into the pit you mean?

A. Yes.

Q. Were the building and towers and machinery all moved away from there, was it all moved away?

A. Yes it has all been moved away.

Q. Tell the jury whether there was ever any fence, barriers or protection of any kind placed there after the machinery and buildings were moved away?

A. Has not been none of any kind.

Q. Have you passed that place frequently since the buildings were torn down?

A. Yes sir.

Q. Tell the jury whether or not later it filled up with water?

A. Oh yes, filled up with water.

Q. How deep was the water, if you know?

A. I don't know how deep it was.

Q. Have you examined it, or rather looked at it as you have passed it frequently?

A. Yes.

Q. Was the water clear or not?

A. Yes sir, it was clear on top, seemed to be kind of a muddy, milky brown looking sediment in the bottom.

Q. I mean the top of the water, did it appear clear?

A. Yes sir, the top of it was clear and nice.

Q. How near to the top of this wall was the water different times when you passed there?

A. Different depths, depend on the rains, sometimes pretty near plumb full and sometimes down quite a ways.

Q. Which way do you live from this pool?

A. Now? I live northwest.

Q. How long have you lived there?

— Pretty near two years; year ago last November I moved there.

Q. How far away from this place?

A. Quarter of a mile or something like that.

Q. You live on what is known as North Kentucky Street?

A. Yes.

Q. North of the United Iron Company's building?

A. Yes sir.

16 Q. You may state if you will Mr. Lee whether or not in passing this place where this water was whether it would be an attractive or an enticing place for children?

A. Why yes.

Mr. McClain: If the Court please, defendant objects as calling for the conclusion of the witness; we ask that he describe the appearance.

The Court: Sustained. The jury must judge from a description of this matter.

Q. State, if you know, whether this place was walled up?

A. Yes, it was walled up with brick.

Q. Walled up with brick?

A. Yes.

Q. Do you know what the bottom was?

A. No I don't.

Q. Don't know whether brick or concrete, or what it was?

A. No, I don't know whether brick or concrete.

Q. How often would you say you have passed this pool since 1910 or since—

A. I couldn't tell, I pass it as much as once or twice a month any-way.

Q. You work for the Prime Western?

A. Yes.

Q. Their building is farther east or east of where this plant was?

A. Yes.

Q. And do you frequently go down to the Prime Western works?

A. That is the way I go every time I go there.

Q. Is that on your direct route from your home to the Prime Western?

A. Yes, direct.

Q. How long was it after these buildings were torn down and the machinery moved out of this acid plant pit until it filled with water?

A. I couldn't say as to that Mr. Oyler.

Q. Have you an opinion or judgment?

A. Yes, it was along in the winter, some time, it filled up with water that fall and winter it filled up with water.

Q. And what has been its condition ever since?

A. It has just been laying there open ever since.

Q. Full of water?

A. Full of water or part full of water at any rate all the time until it happened and then they filled it up.

Q. How much acid would you say was dumped in there from these pipes, or whatever it was the acid was taken from and dumped into that pit? Give your best judgment whether it was a barrel or one hundred barrels?

Mr. McClain: If the Court please, defendant objects for the reason the witness has not shown himself qualified to state whether it was acid or not, and asks for a conclusion.

The Court: He may state how much of this liquid substance.

A. To the best of my judgment must have been one hundred barrels or over one hundred barrels, looked to me, it was a big pit.

17 Q. These places you say was filled with it?

A. Yes, and in taking it out they dumped it in there.

Q. You worked around there when the machinery and buildings were being torn down; did you come in contact with that acid?

A. Yes I got it on my clothes and hands.

Q. What was the result?

A. What was the result, it eat holes in them.

Q. It eat holes in your clothes?

A. Yes sir.

Q. Did it affect your hands?

A. Yes, make your hands sore, eat your hands.

Q. What kind of protection did you have for your hands?

A. Rubber belting, what we called pads.

Q. Rubber pads to handle these pipes and stiff with?

A. Yes.

Q. You say you were working for the defendant company at the time?

A. Yes.

Q. They paid you for your work?

A. Yes.

Cross-examination.

Questions by Mr. McClain:

Q. What is your name?

A. George W. Lee.

Q. Where do you live?

A. In Iola, 421 North Kentucky.

Q. How long have you lived there?

The Court: He says two years in November.

A. Be two years the 22d day of November.

Q. When did you begin to work for the defendant company?

A. April, 1910.

Q. When did you quit?

A. In November I think, December, I don't know just what time I did quit.

Q. At the time you quit what was the condition as to the dismantling there of their plant?

A. It was about all gone.

Q. Was the tower building torn down?

A. I think it was all of it.

Q. All the machinery removed?

A. No there was some little engines and things that was not removed.

Q. Were the pipes and so forth in this basement all taken out when you quit work?

A. Yes that was all out of there.

Q. That had all been removed?

A. Yes.

Q. What was your occupation around there at the time you speak of having seen something put into this basement?

A. Well, I wasn't doing anything at that time.

Q. Just loafing around?

A. Went out to work and didn't work and went into the tower building where Mr. Stockton was tearing it down——

Q. Speak louder.

A. My teeth is all pulled out and I can't talk very plain.

The Court: Do the best you can.

18 Q. What was the appearance of this material that you saw thrown in there?

A. What was the appearance?

Q. Yes.

A. Well it was kind of a chemical stuff in hard lumps and such as that.

Q. What color was it?

A. White color.

Q. Where did they get it from?

A. Couldn't tell you that, it was in the building.

Q. What building?

A. In the tower building.

Q. You mean this high building there over the basement?

A. Yes.

Q. And they got it from there?

A. That is where they rolled it from.

Q. What did they get it out of?

A. What did they get it out of?

Q. Yes.

A. I don't know what they got it out of.

Q. You were standing there watching them?

A. It was in barrels.

Q. What kind of barrels, I mean, wood or metal?

A. Yes, they were wooden barrels.

Q. And were they sitting in the tower building?

A. Yes.

Q. And they knocked their heads open, did they?

A. I don't think they had any heads in them, piled in there in a cake.

Q. Piled in there in a cake, and they turned and poured that into this place?

A. Yes.

Q. How many barrels do you say you think they put in there?

A. I didn't say, I don't know, I seen them empty some in there I couldn't say how many.

Q. How many would you say?

A. Three, four, five.

Q. Three, four or five barrels?

A. Yes sir, while I was standing there.

Q. And now did that fill this pit up pretty well?

A. Why a little, didn't fill it up pretty well, four, five barrels.

Q. Did you see them put any more in?

A. No I didn't see them put any more in; I seen it after there were more put in though.

Q. How much had they filled it up then?

A. Getting away up, half full or something like that.

Q. What I am getting at, where do you get this one hundred and fifty barrel idea?

A. From the size of the pit and the depth of it.

Q. It was entirely filled up?

A. Pretty near filled up.

Q. And it was filled with this substance in cakes, was it?

A. That was put into it, it was filled with the acid and the substance, as you call it, that was put into it, I don't know, altogether why it filled it up, there might have been lots of other stuff in it, so far as I know.

Q. What was the color of the acid you saw put in?

A. I couldn't tell the color, sort of brownish colored stuff that laid in the pipes there.

19 Q. How do you know it laid in the pipes?

A. Bound to.

Q. How do you know it, or do you know it?

A. It had to be there.

Q. Do you know it was in the pipes at all?

A. Certainly.

Q. Did you see them take it out of the pipes?

A. Seen them pour it out in there.

Q. Was it a fluid?

A. Yes sir, it was a fluid.

Q. What pipe was it poured out of?

A. Poured out of the pipes the acid run through and went around.

Q. What kind of pipes were they?

A. I couldn't say, never had hold of them.

Q. Iron or wood?

A. Lead I suppose.

Q. Lead?

A. That is what I thought; they would empty them right into there as they took them out.

Q. Were you there when that was done?

A. Yes, I was in there when they was emptying some of them.

Q. Was any of the stuff you saw put in there liquid?

A. It was all liquid, the acid part was.

Q. Kind of yellow?

A. Some of it was clear and some milky looking color.

Q. What do you mean by clear, have any color?

A. Not much, clear water color.

Q. Clear water color?

A. Call it color or no color, as you please.

Q. And that come out of the pipes?

A. Yes.

Q. And how much of that did you see poured in?

A. I couldn't tell you, I ain't no idea.

Q. Where did it come from, I mean what buildings?

A. Tower building.

Q. Right down from the tower?

A. I don't know if it was right from the tower, but they would loosen the pipe and pour it down in there and run it into the pit.

Q. Were those lead pipes open in this place, taken apart so you could see them?

A. Yes.

Q. Were you there when the eggs were taken out or the pumps?

A. When the eggs were taken out?

Q. The oval pumps down in the bottom of the pits?

A. No I don't think I was there.

Q. They were gone before this happened?

A. I couldn't tell you because I didn't really pay attention enough to it to tell. Wouldn't know what it was if I was to see it.

Q. Well it was an iron or metal concern the shape of an egg, three or four feet in diameter and four or five feet high. Did you see anything like that around there?

A. I don't think I ever did.

Q. Down under the floor?

A. No sir, I can't tell you, been so long ago and so much there. I never paid any attention, I don't really know.

Q. All you know as to the composition of any of these substances that was put in there was what you were told?

20 A. Yes, I seen that.

Q. I say, all you know as to the composition of any of these substances that was put in there was what you were told?

A. Yes sir, of course, what I was told.

Q. You don't know of your own knowledge what the composition of any of it was?

A. No sir, I don't know, I am no chemist, and ain't got no education.

Q. I understand that this was in 1910?

A. I think so, yes sir, 1910.

Q. One more question and I am through. You live on North Fourth Street.

A. No sir.

Q. North Second?

A. No sir.

Q. I thought you said you lived northwest of this tract?

A. I do.

Q. Where is it?

A. North Kentucky.

Q. Now to start to the Prime Western you come out the Katy track a ways, don't you, come out along the Katy track and then cross this tract, the northeast corner?

A. The northeast corner of which track are you talking about?

Q. United Zinc and Chemical Company tract?

A. Yes.

Q. That is the way you go to the Prime Western?

A. Yes.

Redirect examination.

Questions by Mr. Oyler:

Q. Mr. McClain asked you if you knew or had any knowledge as to whether this was sulphuric acid or not; you worked around there for a long time?

A. Yes sir.

Q. This stuff that you saw was in liquid form, came out of the pipes that were in the pit there in the tower building?

A. Yes, in the pit in the tower building.

Q. And you saw it poured out of those lead pipes into this pit?

A. Yes.

Q. And was this the stuff that you say burnt your hands and clothes when working around there?

A. That was what it was.

(Witness excused.)

Mr. Robertson: If the court please, we offer in evidence the deposition of Mr. J. M. Brown.

(The deposition of Mr. J. M. BROWN, offered and received and read in evidence, is as follows:)

(Read by Mr. Robertson:)

Direct examination.

Questions by F. J. Oyler, attorney for plaintiffs:

Q. What is your name?

A. J. M. Brown.

21 Q. Mr. Brown, where do you live now?

A. Thornton, Arkansas.

Q. You used to live in Iola?

A. I did.

Q. Used to be in business here?

A. I did.

Q. You may state if you was here in the summer of 1916?

A. I was.

Q. Are you acquainted with the plaintiff Mr. Britt, sitting here?

A. Not personally, I know the man now when I see him.

Q. You may state if you was in the east part of Iola on or about the 27th day of July, 1916, when a couple of boys were taken out of a pool of water out there?

A. Well, I was there when the last one was taken out; the first one was just taken out but was there.

Q. Did you see them both?

A. I did, yes.

Q. You may state if you will, and if you know, where that pool of water was located as to the old Zinc and Chemical Company's plant?

A. It was where we knew as the acid smelter, and I believe and — positive in my assertion because I was in business when it was running, right in Kentucky street there.

Q. You may state if you had an occasion to go in that water?

A. I did.

Q. What for?

A. To try and rescue the child left in the basin.

Q. As I understand you, one had been taken out?

A. Yes, one was taken out when I got there.

Q. Now just describe, Mr. Brown, what you did and what took place after you got there.

A. Well, I threw off my shoes and outer garments and simply plunged in; he had gone down the last time, and some little boy, I believe he claimed to be a cousin or something, tried to locate where he had gone down the last time, and located me in the west end of the basin; and I dived there three times. There were four of us from the Kaw Paving Company went from where we were unloading water for the Kaw Valley Paving Company at the switch; four of us went in there. The boy discovered the body dived in the north end; the body shifted some going down.

Q. How deep was the water there, just give your best judgment?

A. Just seemed like deep as a well. I dived to the bottom. I was raised on the river and that was one of the deepest dives I ever made.

Q. Have you any judgment how deep the water was at that place?

A. It was fourteen feet, as they claimed.

Q. Did you see the boy after he was taken out?

A. Yes sir, helped as soon as he was brought to the surface and to give first aid.

Q. Tell the court what you did and what the others did with the boy at that time?

A. Just as soon as his body reached the surface I called
22 as loud as I could to get the pulmotor, and we manipulated the body.

Q. How did you manipulate the body?

A. We did everything?

Q. Just tell how you manipulated the body?

A. First tried to empty the water out and then tried to restore respiration by working the limbs and rubbing.

Q. Did you notice any blisters or burns on the boy's face and body?

A. I can't say that I recognized any burns at that time.

Q. Did you see the boy later?

A. No.

Q. Was that the one that lived till the next day, do you know.

A. No, I helped to take the one that lived to the next day home after the pulmotor came.

Q. Now did any doctors come?

A. Yes.

Q. Who came?

A. Christian came and went to the boy—to the house; I don't know who came with the pulmotor.

Q. Was Dr. Walker there?

A. I don't know Dr. Walker.

Q. Who came with the pulmotor?

A. I knew no one but the station boys, and don't know their names either; by the way I recognize the faces but not the names; there was a doctor there.

Q. What was the final result of that boy, did he live or die?

A. He died, never did recover; didn't breathe that we recognized.

Q. What condition was the water in as to being clear or not when you went in?

A. I didn't stop to look as to whether it was clear or not.

Q. Did you pay any attention to it after you got out?

A. Yes sir.

Q. Was the water clear or not?

A. Well it was very roily by that time, could notice it.

Q. What do you mean by being roily?

A. Seemed to be muddy, when we came out.

Q. Now what effect did this water have on you after you went in there if any?

A. Well of course, I realized it was the acid smelter when I went in and tried to be careful and keep my eyes shut, but in going down struck a boiler or iron pipe or something and cut my foot very severely, and the water also got in my ears.

Q. What effect did it have on your body or any portion of your body?

A. Why, I was unable to sleep at all the first night and will say I was at least two weeks recovering from the effects of the experience I had.

Q. Well did you call a doctor or have any medicine or medical attention because of that condition?

A. We didn't call the doctor there, but Mrs. Brown, my sister-in-law called Dr. Christian and asked his advice, and he gave her advice and we applied home remedies; but didn't call the doctor to the house.

23 Q. Did you suffer any as a result of going in that water, I don't mean the injury to the foot or leg, but by reason of coming in contact with the water?

A. Yes sir.

Q. Now, just tell how it affected you and in what way.

A. Burning sensation, very burning to me.

Q. How long did that burning sensation continue?

A. I would say week or two weeks before fully recovered from it, and seemed to put poison in that sore, it was very painful.

Q. That is you mean the sore on your leg?

A. On my foot where I tore my foot in diving.

Q. Now you say you didn't sleep any the first night?

A. Not any, no.

Q. What was the reason, after being in that water?

A. Because of the pain in my head and eyes, it didn't get in my eyes but around the lids, so painful kept me walking the floor all the night.

Q. Do you notice any effects from that at the present time?

A. Not that I can detect, no.

Q. Now you say you didn't recover from that burning sensation for how long?

A. Almost two weeks I judge; I could still feel the effects that long I would say.

Q. Now you said while ago that it was known as the acid smelter, had you been around the plant a good deal when it was in operation?

A. No, I hadn't been around it, only viewing it from the road, and what I heard of it, that is all.

Q. Now you had been there to the plant had you?

A. Not while running; never been inside of it that I remember of.

Q. Did you see either of these boys after they were dead?

A. I did not.

Q. Didn't see them while at the morgue or anything of that kind?

A. I did not.

Q. Who got the little boy out finally?

A. Johnny Fitzpatrick. They told me one of the Dalton boys got the first out. But he had gotten him out by the time I got there.

Cross-examination.

Questions by Mr. Baxter D. McClain, attorney for defendant:

Q. You had never seen this cellar until that day?

A. Never been up to it, Mr. McClain. I knew the location because I was close to it, that's all.

Q. You had lived in East Iola?

A. Yes, on the corner right where the store is located there now. Foster's is there now.

Q. You didn't know any of these parties?

A. No sir.

Q. And you were working there with the Kaw Paving Company crew when this occurred?

A. Yes.

Q. What first attracted your attention?

A. Some little boy came crying for help.

Q. From the direction of this place?

A. From the cellar, yes sir.

24 Q. Do you know who the little boy was?

A. I do not.

Q. Was he the same little boy you refer to while ago that told you the location?

A. Now I'm not certain about that, Mr. McClain, some little boy came screaming, and I went past him and by the time I got my clothes in shape some boy was trying to tell me where to dive.

Q. How big was this cellar?

A. That would be hard for me to give; my judgment is that inside was 10 by 12 feet wide and maybe 20 by 30 feet long.

Q. And do you know what the depth of it was?

A. Well I judge fully as deep as they said it was.

Q. As who said it was?

A. Different parties told me it was fourteen feet.

Q. You think it was that deep?

A. Yes, I think that deep.

Q. Did the walls of the cellar come up to the surface of the ground or not or above?

A. The outside wall above, and the inside down two or two and half feet, something around there as near as my judgment can tell.

Q. Was the water up to the inside wall.

A. It was over the inside wall I judge from two to two and half feet deep.

Q. Then it came up pretty near to the height of the outside wall?

A. Pretty much, yes; I don't know just how much, would say the inside was deeper than the outside, I would say the water was two or two and half feet deeper than the inside wall.

Q. How many persons were over there with you from the Kaw Valley crew?

A. I don't know, there was four of us diving.

Q. Who were they?

A. One was John Milne's boy, our water boy, and a Mr. Smith, resident of East Iola, and Johnny Fitzpatrick who recovered the body and myself.

Q. When you got there had one boy's body been recovered?

A. Yes, it was. I passed it.

Q. Was that the older or younger?

A. My judgment, it was the oldest boy.

Q. Was he dead?

A. No.

Q. He was alive?

A. Yes.

Q. Was he breathing?

A. Yes.

Q. They had taken him out of this cellar?

A. Yes sir.

Q. Who took him out?

A. A young man by the name of Dalton.

Q. And the other boy was still in there?

A. Yes sir.

Q. Was he dead when he was recovered—the last one?

A. Well never could detect breathing any Mr. McClain.

Q. Apparently dead?

A. Yes.

Q. How long were you in the water there in the cellar, would you say?

A. Oh, perhaps fifteen minutes.

Q. How many times did you dive?

A. Three times.

Q. Now when did you first notice the effect of the water in the cellar on you?

A. Soon as I—well before I came out could tell it was burning.

Q. Where was it burning?

A. My skin and especially where I cut my foot, painful cut between my toes, where it was cut on the boiler iron.

Q. This cut then you noticed that first?

A. Yes.

Q. Then after you got out where did it smart you?

A. Well especially in my eyes and ears.

Q. Was there any blisters apparent?

A. Well it was inside of my ears, in fact that it hurt awfully bad, but smarted some all over my body; not so bad as where it got to the mucous membrane.

Q. And you treated those you say ten days or two weeks before you got relief?

A. Yes -ir.

Q. Did you taste the water in there?

A. No sir.

Q. Aside from that did it have any other effect on you, this smarting?

A. It smarted all over my body just slightly, but nothing to damage me except this membrane I described that I could detect.

Q. No other effect than the smarting of the water?

A. Well it poisoned that foot and caused it to ulcerate and sloughed off like a poison sore.

Q. How long before it got well?

A. About two weeks and my head pained me, and my ears especially almost that length of time.

Q. But didn't burn your lips?

A. Not bad.

Q. Nor didn't burn your mouth?

A. Yes, felt it burning mouth, but I tried to keep my eyes and mouth tightly shut to protect them, but couldn't do that to protect my ears or nose.

Q. Now you call this the acid cellar, where did you hear that first?

A. Simply from the fact that they were making acid there.

Q. That was from hearsay?

A. No, there was a sign on that plant and it was the same place the building was standing on.

Q. As a matter of fact you don't know whether there was any acid in it or not?

A. I know something there.

Q. Yes, but as far as the acid, it was because they called it the acid plant cellar?

A. Yes.

Q. That would be a conclusion though?

A. Certainly.

Q. And you say what doctors were there?

A. I didn't know the doctor came with the pulmotor; Dr. Christian was called I believe was called to the residence. I believe it was Christian, I am not over certain; but it was not Reid. I don't know the doctors apart and couldn't be real positive about that. Was at the house when summoned and in my judgment it was Christian.

Q. Did the doctor then come with the pulmotor go with the pulmotor to the pit or to the house?

A. The one came with the pulmotor came to the pit.

26 Q. And Dr. Christian if you are right in the matter, he came to the house?

A. Some doctor came to the house.

Q. You think it was Christian?

A. Yes, he came to the house.

Q. Where do you now live, Mr. Brown?

A. Thornton, Arkansas.

Q. And you are here, just happened to be here on a visit?

A. Well, I was sent for.

Q. You came here to have your deposition taken?

A. I came here to have my deposition taken.

Q. As I understand you, Mr. Brown, all four of these persons you name were in the water, three others and yourself?

A. Of our crew, yes.

Q. Was there any one else in the water?

A. Not at that time, no.

Q. Well do you know (interrupted by witness).

A. Well I don't know whether the other boys got in the water or not, don't know how they got him out, how the other child was gotten out.

Q. State again who were in the water?

A. I don't know, Tom Milne's boy's name; his boy; and a Mr. Smith, and Johnny Fitzpatrick, he is somewhere in Missouri now; don't know where he lives.

Q. And yourself?

A. And myself.

Q. When you got there the condition of the water was such that you couldn't see down in the cellar?

A. Oh, I didn't try to look down in, run right in, didn't pay any attention to the water.

Q. I mean with the view of seeing the boy?

A. No, I took the instruction of the young boy trying to give me. Took his advice and went where he told me as near as I could.

Q. Well, I gathered from what you said you couldn't have seen anything very far?

A. No, I couldn't.

Q. The little boy didn't come up at all after you got there?

A. No.

Q. And Fitzpatrick finally got him?

A. Yes.

Q. What part of the cellar did he get him from?

A. The body apparently at the north end, pretty much to the north end; yes, he was diving in the north end; I was in the south end and the other two boys between us; the location as near as I can give it.

Mr. Robertson: Plaintiff offer- the deposition of Ernest Dalton.

(The deposition of ERNEST DALTON, offered, received and read in evidence, is as follows:)

(Read by Mr. Robertson:)

27 ERNEST DALTON, being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposeeth and said:

Direct examination.

Questions by F. J. Oyler, attorney for plaintiffs:

Q. What is your name, Mr. Dalton?

A. Ernest Dalton.

Q. Where do you live?

A. 316 South Kentucky, Iola, Kansas.

Q. How long have you lived in Iola, Kansas?

A. Oh, about eighteen years I guess.

Q. How old a man are you?

A. Twenty-five.

Q. Where are you employed?

A. Prime Western Spelter Company.

Q. How long have you been working at the smelter company here in Iola?

A. Ever since big enough to work at one.

Q. You remember when the United Zinc & Chemical plant was running out there?

A. Yes sir.

Q. Had you been around, through or near it a good many times?

A. Quite a few.

Q. Ever work there?

A. Yes sir.

Q. When did you work there, Mr. Dalton?

A. Well, don't remember what year it was.

Q. What kind of work did you do?

A. Worked on the furnace little bit, unloaded ore most of the time.

Q. What did they manufacture there?

A. Well they made acid, zinc.

Q. What kind of acid?

A. Well couldn't say that; I know they made acid.

Q. Did they have an acid plant?

A. Yes sir.

Q. Did you ever work in that?

A. No.

Q. Been in it?

A. Yes, I have been in it.

Q. Now you may state, Mr. Dalton, if you were out at this old plant on the 27th day of July, 1916, when the little Britt boys were drowned there, or died from the effects of going in the pond?

A. I was.

Q. Just state what you saw when you got there and what took place?

A. Well I was just over there walking around and heard some little boys holloing over there and run over there and saw one of the boys just going down and jumped in after him and got him out.

Q. Now which boy was that oldest or youngest boy?

A. Well don't know them apart.

Q. Was he alive when you got him out?

A. Yes sir.

Q. You may state what you did after you got him out—whether worked with the boy or not?

A. The first one?

Q. Yes?

28 A. No, never worked with the first one, just fished him out, set him on the bank and set there a while and threw up a little and seemed to be all right a little bit, alive and everything.

Q. Did you say he vomited?

A. Yes.

Q. Did a doctor or any one come soon?

A. Well, I don't know just how long it was from the time to get over to a 'phone and get a doctor out there.

Q. What doctor came?

A. Dr. Leavell.

Q. Did anyone come with the pulmotor?

A. Fire department men.

Q. Was Mr. Creason, chief, there with it?

A. Chief, yes.

Q. Now do you know how long the little boy lived that you got out?

A. Well, I think next day or two.

Q. Well he didn't die there?

A. No, he didn't die there.

Q. How many times did he vomit?

A. Only once that I noticed then; might have more, but I didn't know.

Q. How long after that was the other boy gotten out, and did you participate in trying to get the other boy out?

A. No, never tried to get the other boy out; all I could do to get that one out.

Q. What effect did that have on you, Mr. Dalton?

A. Well different ways, choked me; when got out the water could hardly get my breath, and wasn't able to go back in after the other.

Q. Did you get any in your mouth or nostrils?

A. I did.

Q. What effect did it have?

A. About like it would to eat an Indian turnip, burned.

Q. Did it smart and burn?

A. Yes sir.

Q. You may state what effect it had on the body during that day and night.

A. Burned all that day and that night too; and I bathed in soda water and kind a stopped a little bit.

Q. How long did you notice any effect?

A. Oh, it burned for quite a while, a month I guess, something like that, noticed burning a little now and then.

Q. Get any in your eyes?

A. I did.

Q. What effect did it have on your eyes?

A. Well burnt pretty bad, don't know, and hurt them so bad, burnt pretty bad, couldn't look at anything very long.

Q. Get any in your ears?

A. Didn't notice any in my ears.

Q. Now you say you got some in your mouth, you may state what effect it had on your tongue and your lips and mouth.

A. Made my tongue and lips awfully sore.

Q. What condition was the water in as to being clear when you first went in?

A. Well it was roiled up kind of white like when first went in.

Q. When you first went in?

A. Yes.

Q. What did it indicate being, was it muddy or some other kind of roiling?

A. Didn't pay so much attention, it was kind of white.

Q. How deep was it there, do you know, Mr. Dalton?

A. Well one place I guess three feet, and another I guess about ten.

29 Q. How far from the wall did the three foot depth extend?

A. Well the east end of it was the deep part and the west end shallow part.

Q. All the west end was shallow about three feet, and how far out did that extend, how many feet from the wall?

A. Plumb across.

Q. That was from the north to the south?

A. Yes, plumb across.

Q. Then how far east did that shallow part extend?

A. Ten or twelve feet I guess.

Q. Now where was this boy you got out?

A. He was just about in the center of the deep part.

Q. Have you a judgment as to the width and length of this pit?

A. Well, it was about twenty by forty; the whole pit something like that, as near as I can tell.

Q. Well, you are getting right close to it. Did you see the little boys, either of them, after they were dead?

A. I never saw neither one after left out there.

Q. Did you notice the little boy that died out there, the one that was dead?

A. I saw him some there where they had the pulmotor working on him.

Q. Pay any particular attention to him?

A. Don't know as I paid any particular attention.

Q. Did you go home soon after that?

A. Went home soon after taking the boys away.

Q. What for?

A. Went home to get the clothes off, see if I could stop that burning.

Q. Now you say it almost smothered you, tell the jury how it effected your breath or wind?

A. When I went under I guess I had my mouth open, and it, strangled me; couldn't breathe for quite a little bit after I come up.

Q. Have you ever been in the water before swimming?

A. Pretty near all the time.

Q. Did it effect you any different than going in other water?

A. Yes, river water nothing like that, never did bother me any.

Cross-examination.

Questions by Mr. Baxter D. McClain, attorney for defendant:

Q. It was a hot day, wasn't it?

A. Well, pretty warm day.

Q. Where were you when you first heard these boys holloing?

A. Off west a little ways.

Q. What was you doing?

A. Looking around, been over to that Kaw Paving Company there.

Q. Who was with you?

A. Jake Lee was there, Frank Hufferd, Doc. Hufferd, Art Burnett, were there.

Q. Did you all go over to this cellar?

A. Yes.

Q. That's what this was, an old cellar basement?

A. I guess that's what they called it, under the tower building there.

Q. How high up did the walls come as compared with the ground around there?

A. About level with the ground, the walls were.

Q. And the things was about as you say, about how long east and west?

A. Well, I should say about forty feet.

Q. And how wide north and south?

A. About twenty.

- Q. And you say that east half was about ten feet deep?
- A. Yes, about eight or ten.
- Q. And the west half about three feet?
- A. Yes.
- Q. But water over all of it?
- A. Yes.
- Q. Was the water roiled up when you were there?
- A. Was when we got there.
- Q. Did you take your clothes off when you went in, or go in with your clothes on?
- A. No sir.
- Q. Where did you notice this burning you speak of noticing what parts of your body?
- A. Well, I noticed on my mouth and eyes first.
- Q. Did it blister your lips?
- A. Well I don't know as you hardly call it blistered or not; made them awfully sore.
- Q. Blister your eyes or inflame them?
- A. Made them awfully red.
- Q. Produce a blister on your body anywhere?
- A. Don't know that it made a blister.
- Q. You think you must have gotten some of it in your mouth?
- A. Yes, guess I must have gotten some in my mouth.
- Q. Did it blister your mouth inside?
- A. Blistered my tongue.
- Q. The end of your tongue?
- A. All over my tongue.
- Q. Blister the roof of your mouth?
- A. Don't know that it blistered; never looked to see, but it was pretty sore.
- Q. Did you swallow any of it?
- A. Don't think I swallowed any of it.
- Q. You had no open sores on your body anywhere?
- A. No sir.
- Q. How far is that cellar from the road that runs along the south side; the plant side?
- A. I don't know, must be a block from the main road, something like that.
- Q. Can you see that cellar from the main road?
- A. Well, no, I don't know that you could see the hole; had some trash piled around there.
- Q. As a matter of fact this whole *track* had been littered with buildings and trash torn up?
- A. Don't know as to trash.
- Q. Wasn't there some retorts around there?
- A. No, there's retorts on the other side.
- Q. How long were you in that water would you say?
- A. Not in there over five minutes, I guess.
- Q. You were on the east end?
- A. Yes.
- Q. That's the deep part?

A. Yes.

Q. You got the first boy out?

A. Yes.

Q. And what did you do with him?

31 A. Took him out to the bank, sat him on the bank.

Q. Was he breathing?

A. Yes.

Q. Could he talk?

A. No, not right there when first took him out.

Q. He did talk?

A. Yes sir.

Q. Turned sick at his stomach?

A. Yes, after he set down a little bit.

Q. How long did he sit there?

A. Well I never paid much particular attention to him, I was watching them trying to get the other boy.

Q. You got him out, took him up and set him down on the bank, and devoted your attention to getting the other boy out?

A. I didn't try.

Q. But the boy did talk some?

A. After he set there a while.

Q. After he was out a while; but the other boy was apparently dead when taken out?

A. I guess he was, never did breath after took him out.

Q. Where did they take him out as to the place where you took the other boy out?

A. Well, pretty near the same place.

Q. Did the boy on the bank indicate to you or any of them where the other one was or where they might find him?

A. Well there was two other boys there, told where the other boy went down at.

Q. Who were they?

A. Don't know who they were.

Q. Were you there when they took the boys home?

A. Well, yes, I was there.

Q. Who took the boy home that you took out?

A. Well I don't remember, was there when working with the other boy and didn't pay any attention.

Q. When they took the other boy home was he able to walk home or was he carried home?

A. Took him home in the buggy.

Q. Know whether more than one doctor was there?

A. Only one that I saw.

Q. Who got the other boy out?

A. I don't know who he was; some little fellow working at the plant.

Q. Who did you see there that you recognized?

A. Just the fellows with us.

Q. That's the ones you named?

A. Yes.

Q. Did you know Brown?

A. No, not until after.

Q. Do you remember seeing him there?

A. Yes, after seeing him here.

Q. When did he come with reference to your coming?

A. He came just about the time I got the one out.

The Court: (Six o'clock p. m.) We are about to take a recess of court until nine thirty tomorrow morning.

(Jury duly admonished.)

32

(Friday Morning, May 10, 1918—9.30 a. m.)

Mr. Robertson: I offer the deposition of Mr. Jake Lee.

(The deposition above referred to, offered and received and read in evidence, is as follows:)

JAKE LEE, of lawful age, being by me first examined, cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth deposeth and said:

Cross-examination.

Questions by Mr. F. J. Oyler, attorney for plaintiffs

Q. You may state your name, please?

A. Jake Lee.

Q. Where do you live, Mr. Lee?

A. 421 North Kentucky, Iola, Kansas.

Q. How long have you lived in Iola?

A. About fourteen years.

Q. What is your age?

A. Twenty-two.

Q. Where are you employed?

A. No place at the present.

Q. Where have you been employed?

A. Prime Western Smelter.

Q. You may state if you know where the old United Zinc & Chemical plant stood?

A. I do.

Q. You never worked there, did you?

A. No sir.

Q. You lived here when that was in operation?

A. Yes sir.

Q. Did you know where the acid plant of the concern was located?

A. Yes sir.

Q. You may state if you was out there on the 27th day of July 1916, when the Britt boys were taken out of that pond?

A. Well, I'm not certain about the date but was there at the time they were in there.

Q. You may state, Mr. Lee, how you come to go there?

A. Well I heard one of the boys holloing and went over to see what was wrong, and I found one of them was just going down.

Q. You may state if you went in the water or not?

A. I did.

Q. What part was you in?

A. Was all over it.

Q. Where did you enter?

A. What part of the water, you mean?

Q. Yes.

A. I went in the west end.

Q. Now just describe how the wall was there, or was there more than one wall?

A. Yes sir, there was two walls; one I should judge five or six feet above the other wall.

Q. And then how far did the other wall extend out from the side of the pond?

A. About four feet on the side, and judge eight or ten feet at the ends.

33 Q. That is, the side you mean north and south side?

A. Yes sir.

Q. Which way is the long way of the pool?

A. East and west.

Q. Have you a judgment as to the size of the pool?

A. Well I should judge fifteen by twenty or twenty-five, something like that.

Q. You never measured it?

A. No sir, that's the small part.

Q. You mean the deep part?

A. Yes sir.

Q. How large was the entire pool, that is from the top wall clear around?

A. Well, it was forty feet, I expect in length and I expect fifteen or twenty feet wide, I don't know just exactly.

Q. How deep was it in the center if you have an idea?

A. I don't know exactly, some ten or twelve feet.

Q. Did you get either of the boys out?

A. No sir.

Q. Did you go under the water or dive?

A. Yes sir.

Q. You may state if you saw either of the boys after taken out?

A. Yes sir, I did.

Q. What condition were they in?

A. Well, one of them was already dead when taken out, and the other, they took him out and set him on the bank and never paid any more attention then until he was in the buggy.

Q. Did you examine him or pay any attention to him when in the buggy?

A. No, sir, laying down in the buggy, crying, in the seat.

Q. What doctors were there?

A. Not certain about the doctors; but Dr. Leavell was the only one I saw.

Q. Any one come with the pulmotor?

A. Yes sir.

Q. Who brought that if you know?

A. Ceason, I think is his name.

Q. Now was the water over the second wall?

A. No sir, it was not.

Q. Over the platform?

A. The water up over the cellar hole but wasn't to the top of the outer wall.

Q. Are you sure of that?

A. I know it.

Q. Well what effect did the water have on you, if you discovered any?

A. Well it hurt my eyes and my lips peeled off; whether caused from the water or not I don't know; but they peeled off anyhow.

Q. Get any of it in your mouth?

A. Not that I know of.

Q. You say your lips peeled off?

A. Yes sir.

Q. Did it have any smarting effect on your eyes or lips?

A. It did at the time.

Q. Did it have any effect on your body?

A. No sir, none that I could see.

Q. Did you have your clothes on?

A. Yes sir.

Q. How long was you in the water, would you judge?

34 A. Fifteen minutes or more.

Q. Did you observe the little boy that was dead?

A. What do you mean?

Q. I mean did you look at him?

A. Yes sir, I did.

Q. The first little boy taken out, did he vomit?

A. Yes sir, he did.

Q. How many times, if you know?

A. Never saw him but once.

Q. You don't know whether the doctor administered medicine or not when he came?

A. No sir, never stayed very long after they got the second one out.

Q. Did you observe anything out of the ordinary about the face or body of the little boy that was drowned?

A. Didn't pay close enough attention to him.

Cross-examination.

Questions by Mr. Baxter D. McClain, attorney for defendant:

Q. This was really an old foundation, wasn't it Mr. Lee?

A. Well, I don't know what this place was used for.

Q. Well it was an old basement?

A. Yes sir, it is a basement.

Q. As I understand a brick wall around the outside, all the way around?

A. Stone wall, yes sir.

Q. About how wide was it?

A. Oh, it was just dug down in the ground, don't know how thick the wall was, may be two feet, maybe more.

Q. Now the whole thing was covered with water then?

A. Yes sir, the whole thing covered with water.

Q. There was a shallow place at the west end of this basement, and also a shallow part at the east end, and in the center is a deep part?

A. Yes sir.

Q. Now how deep was the water over this shallow part would you say?

A. Well I judge two and half feet.

Q. And how deep in this center part?

A. Ten or twelve feet, don't know exactly.

Q. How deep would you say that center part was?

A. Fifteen or twenty feet.

Q. Did it reach clear to the side wall?

A. No sir.

Q. Just sort of a depression in there?

A. Yes sir.

Q. Now when you went in where did you go in from?

A. The west side.

Q. Did you go through this shallow water?

A. Yes sir.

Q. And then down in the deep?

A. Yes sir.

Q. Were both boys in there at that time?

A. Both in when I first went in, yes sir.

Q. Was either one in sight?

A. Well, no, there was neither one in sight the first time; the oldest one came up after I went in the water.

Q. And did you get hold of him?

A. No sir, I did not.

35 Q. Did some one else?

A. Yes sir.

Q. Who?

A. Ernest Dalton.

Q. And Mr. Dalton then took him out and set him down on the bank?

A. Yes sir.

Q. That boy was conscious?

A. He was still alive.

Q. He was breathing and finally lived?

A. Yes; I talked to him a short while.

Q. You then went down after the other boy?

A. No sir, set down over there before I knew another was in there.

Q. Then you went back?

A. Yes sir.

Q. How many times did you dive?

A. Five or six, don't know just exactly.

Q. Now where were you when you first heard these boys holloing?

A. Just north of that place about a block or block and half.

Q. Over toward the railroad?

A. Yes sir.

Q. Who was with you?

A. Earnest Dalton.

Q. Any one else?

A. Frank Hufferd; Ernest Hufferd.

Q. Those persons you named?

A. Yes sir.

Q. You had been over to the Kaw Valley Company crew had you not?

A. Yes sir.

Q. And were going north and had gotten past this basement.

A. Yes sir.

Q. Did you notice any one there when you went by, or do you remember?

A. No sir, no one, no boys at the pond as I went by; passed us further up past the water.

Q. They came from the north?

A. Yes sir.

Q. Where did you first see them coming from the north?

A. Close to the north end of the old brick building about a block or block and half from this hole of water.

Q. Northwest wasn't it?

A. Yes sir.

Q. Had you seen them before that time?

A. No sir.

Q. How many in the crowd?

A. Don't know exactly, four or five.

Q. And you passed them as you went north?

A. Yes sir.

Q. Did you notice what they were doing, anything?

A. No sir, not particularly.

Q. Have any junk or anything?

A. No sir, nothing that I saw.

Q. You say this water caused your eyes to burn?

A. Yes sir.

Q. And your lips?

A. Well my lips peeled off, whether or no the water caused it or not I don't know.

Q. Did they burn.

A. Yes.

Q. How long did the burning sensation last after you came out of the water?

A. My eyes burned three or four days, but didn't notice lips after an hour.

Q. That was the only sensation you noticed from the effect of the water?

A. Yes sir.

36 Q. Had you any open sores on your body when you went in?

A. None that I know of.

Q. Did you give your eyes any treatment?

A. Yes sir, went over to Clairborne's mill and as soon as I left there washed my face.

Q. But you wouldn't say your lips peeling off was caused from this?

A. No sir, couldn't say.

Redirect examination.

Questions by Mr. Oyler:

Q. I guess you didn't understand me a while ago, Mr. Lee, I asked if the water was over the second wall, you didn't understand, the outside wall was what I meant, the outside wall?

A. Yes sir.

Q. That is it was not over the wall next to the dirt, but was over the wall extended inside toward the center?

A. Yes sir.

Q. How deep was that?

A. About two feet and half.

Recross-examination.

Questions by Mr. McClain:

Q. Scattered all about this place were pieces of foundation and stuff where they dismantled this plant, was there not?

A. Yes sir.

Q. How far away from this basement would you say it would be observable—that you could see water in it?

A. Well you could see water at a distance or 100 or 150 feet at the north, east and west side.

Q. From the south side?

A. Well have to be up against it because of the trash up there and the water came up pretty near to the outside foundation.

Redirect examination.

Questions by Mr. Oyler:

Q. This stuff that was on the south was retorts and one thing and another that was thrown there, or tiles and pieces of sheet iron, cement and things of that sort; were there any retorts there?

A. No, no retorts I don't believe there.

Q. But such stuff as they had used there at the plant?

A. Yes sir, old brick bats.

Mr. Robertson: We now offer the deposition of Ernest Hufferd.

(The deposition above referred to, offered and received and read in evidence, is as follows:)

37 ERNEST HUFFERD, of lawful age, being by me first examined, cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, depose~~th~~ and said:

Direct examination.

Questions by F. J. Oyler, attorney for plaintiffs:

Q. Where do you live, Mr. Hufferd?

A. 111 South Ohio, Iola, Kansas.

Q. How long have you lived in Iola, Kansas?

A. Fifteen years.

Q. How old are you?

A. Twenty-seven.

Q. Where are you employed?

A. No place right at the present.

Q. Where are you usually employed?

A. Well, at the Prime Western Spelter down here and last place United Iron Works.

Q. But at the present you are not working?

A. No sir.

Q. You may state if you know where the United Zinc & Chemical plant was?

A. Yes sir, I did.

Q. Did you ever work there?

A. Yes sir.

Q. When, Mr. Hufferd?

A. Well I was working there at the time it closed down.

Q. Do you remember the year that was?

A. I believe it was 1909, I am not sure.

Q. Well did you know where the acid plant part of the plant was?

A. Yes sir.

Q. Was there used in connection by the United Zinc & Chemical Company an acid tank and pumps, and one thing and other?

A. Well couldn't say, wasn't in that part of it.

Q. Which part of the building was that, east or west?

A. Well I couldn't say about the east department, because I wasn't in the east department.

Q. Was you out there on or about the 27th of July, 1916, when a couple of little boys were taken out of the pool?

A. Don't remember date, but was there when these boys were in the water.

Q. You mean the Britt boys?

A. Yes sir.

Q. You may state what took place and how you come to go there, just state in your own way?

A. Well a bunch of us fellows were over there looking round, and heard these boys holloing for help; and all run over there where they was.

Q. What did you see?

A. Well Jake Lee and Ernest Dalton they went in after them; and then there was another come from this Kaw Paving Company, men came from over there and they went in too.

Q. Did you go in the water?

A. No sir, I had boils all over me, I was afraid of it.

Q. Why were you afraid of it?

A. Heard there was acid in it and you could see it wasn't clear, looked kind of yellowish looking.

38 Q. Was it roily at that time?

A. Yes sir, roiled up when I got there.

Q. Do you have an opinion as to the size of that pool?

A. You mean from the outside wall?

Q. Yes?

A. I should judge twenty by forty, somewhere along there.

Q. Did you see either of the boys after they were taken out?

A. Yes sir, both of them.

Q. Did you work with the one that was taken out that died there or dead when taken out?

A. No sir, never had hold of him.

Q. Pay any particular attention to him?

A. Well around there all the time where I could see him.

Q. Well did you observe him closely or did you not?

A. Well, yes, I was right close to him.

Q. Did you observe any burns or blisters on his mouth or face, or any place?

A. Well I could see red spots on his body, don't know what it was caused from.

Q. Just describe the red spots, what they looked like?

A. Well looked kind like sun burn, just red in spots.

Q. Different spots over the body?

A. Yes sir.

Q. Did you see the little boy that was yet alive?

A. Yes sir, talked with him.

Q. Pay any attention to him particularly?

A. Well was talking to him when sitting on the bank.

Q. Did he vomit any?

A. Yes sir.

Q. Did he appear to be conscious and all right?

A. Well he was not when he first come out, vomited, talked for five minutes anyway after he come out.

Q. Did you notice his mouth after he vomited, anything wrong with it or not?

A. Well his lips looked purple.

Q. Did you notice his body?

A. No sir, never saw his body.

Q. Anyone come with the pulmotor?

A. Yes sir.

Q. Who?

A. Don't know their names.

Q. Was there a doctor there?

A. Yes sir.

Q. Who was it?

A. Couldn't say, didn't know him.

Q. Don't know whether Dr. Leavell or not?

A. Don't know him, couldn't say.

Q. Describe if you will if there was a second wall or platform leading out from the first wall?

A. There was; there was first inside deep part I should judge about 15 by 20 foot wide, and there was kind of offset and another wall was about 20 by 40 feet wide.

Q. Now was the water over both of those?

A. Over both walls.

Q. Now as I understand the deep part was in the center, then there was a platform or another wall extending out to the wall next to the earth, is that correct?

A. Yes sir, an offset out from the first one out.

39 Q. Was water on this offset?

A. Yes sir.

Q. Could you see the bottom of it?

A. No sir, could not, it was roily.

Q. Had there been several in before you got there?

A. Yes sir, six or seven when I got there.

Q. Now you say roily at that time, just explain how it was roily?

A. Well it looked like, oh, just kind of a yellow like, like grease on top of the water, kind yellowish looking stuff.

Q. Had you been there before?

A. Yes sir, I had been to this pit before.

Q. When?

A. Well just a short time before these boys got drowned.

Q. Did you observe the water then?

A. Yes sir.

Q. Was it clear or not at that time?

A. Well it was clear, yes, but you could see sediment around this offset, you could see the stuff in the bottom of it.

Q. What kind of stuff?

A. Kind of yellowish stuff.

Q. That was on the bottom of the foundation was it?

A. That was on this between the deep part and the outside wall of this offset.

Q. On this second raise from this deep part?

A. Yes.

Q. What was the bottom, brick, stone or what, either at the deep place or next the high wall?

A. I couldn't say, it seemed to be kind of trash of some kind in the bottom.

Q. Now this yellow stuff you say, was it in the water or was it trash?

A. No, it was not; it was, I don't know, when this water was roiled up you could notice it come to the top.

Q. Apparently some kind of sediment?

A. Yes sir, looked to me like sediment in the water.

Cross-examination.

Questions by Mr. Baxter D. McClain, attorney for defendant:

Q. You say you saw this once before?

A. Yes sir.

Q. A short time before this accident?

A. Yes sir.

Q. And it then looked murky, dirty underneath?

A. Yes sir, yellowish looking stuff under the water.

Q. The water, was it clear?

A. Well it was clear when I was there then; the water was clear but could see the other stuff in the bottom.

Q. Did it look good to drink?

A. Didn't look good to me.

Q. As it appeared there as you say it did, it looked inviting to go in swimming?

A. It wouldn't to me, no sir.

Q. That's the way it looked to you?

A. Yes sir.

Q. Now you say there was some red spots on this one boy's body; that's the one dead when taken out?

A. Yes sir.

Q. Where was it on the body you particularly noticed?

A. Noticed on the back, on the shoulders.

40 Q. You don't know whether the water did that or not?

A. I couldn't say.

Q. Those are the ones you noticed particularly?

A. Yes, and noticed some on his breast.

Q. Looked like sun burns?

A. No, just red spots.

Q. Yes, I say red like sun burn?

A. Yes sir.

Q. Were the boys both naked when taken out?

A. Well, I don't remember whether they were or not; the one was, I was kind of excited.

Q. Which one was naked?

A. The one that was dead.

Q. Couldn't say whether the other one was or not?

A. I couldn't say.

Q. Was the other two boys there naked or not?

A. The other two wasn't in the water; no they wasn't naked.

Q. Had they been in the water?

A. I don't know; they had their clothes on any way.

Q. Where did you pass these boys before they holloed?

A. Well little ways northwest; little northwest of this hole of water.

Q. The boy on the bank talked to you?

A. Yes sir, after about five minutes.

Q. Did you see him vomit?

A. Yes sir.

Q. Did you go home with the boys when they were taken home?

A. No sir, I didn't.

Q. Did you know any of these parties before this thing happened?

A. Who do you mean?

Q. Mr. Britt and his family?

A. No sir, I didn't know them.

Q. Did you know those other two boys with them?

A. No sir, didn't know none of the boys at the time.

Q. Did you know afterwards who they were?

A. No sir, never did know the other two afterwards.

Q. Didn't know who they were?

A. No sir.

Q. How large were the other two compared with these two that were drowned?

A. Well they were smaller boys than the ones drowned.

Q. Now you stated you had heard there was acid in this pit, where did you hear it?

A. Well, heard several say it was where they kept their acid tanks when it was running.

Q. Down in this basement?

A. Yes sir.

Q. And did they say there was acid in this hole?

A. Well didn't exactly say there was acid in this hole, but said it was the acid tanks in there.

Q. Who told you that?

A. Don't remember who told me that, but several.

Q. What was the occasion telling you that?

A. Well just talking about it.

Q. Was that before or after this accident?

A. Before.

Q. How long before?

A. Just a short while.

Q. As a matter of fact wasn't it that time you were there before?

41 A. No it was not the time I was there, it was before that.

Q. And they said that was where they kept their acid tanks?

A. Yes sir.

Q. That conversation was brought up by the appearance of thing there?

A. Well the conversation was brung up over the acid plant being torn down.

Q. That was remark that that's where the tanks were, that basement?

A. Yes sir.

Q. Was the time when you talked about that any water in it?

A. Well I couldn't say, I was not at it at the time when the conversation was.

Q. There was no acid tank there when you were there prior to the accident?

A. I couldn't tell; full of water and couldn't see nothing to indicate such a thing.

Q. If they were in it would be under water?

A. Yes sir.

Q. Do you know what they are like, ever see one?

A. No sir.

Redirect examination.

Questions by Mr. Oyler:

Q. You said it didn't look good or inviting to you, was that because you had heard the condition, that there was acid in there?

A. Well that was one reason.

Q. And what was the other?

A. Well by the stuff that was in it, trash.

Q. What kind of trash?

A. Well pieces of sheet iron, tin and this yellow stuff in the bottom.

Q. Where was the sheet iron or tin?

A. Little pieces all around the end, around this offset what I mean.

Q. How far could you see the water from the southwest and the east of the pool?

A. Oh, I should judge about close as a block, something like that.

Q. One hundred fifty feet, something like that?

A. Yes sir.

Recross-examination.

Questions by Mr. McClain:

Q. You couldn't see until after you got well on the track where the old acid works was?

A. No sir, couldn't see.

Q. Have to go over on the tract to see it?

A. On the premises of the old chemical company.

Redirect examination.

Questions by Mr. Oyler:

Q. Mr. Hufferd you said you talked with the little boy immediately after he was taken out of the pool?

A. Yes sir.

Q. What did you talk to him about and what did he say?

42 By Mr. McClain: The defendant objects as incompetent, irrelevant and immaterial, detailing a conversation of a deceased person; and for the further reason it is hearsay.

The Court: Objection sustained.

Mr. Robinson: Plaintiffs except.

Recross-examination.

Questions by Mr. McClain:

Q. This was the boy who didn't die until a day or two afterwards?

A. Yes sir.

Mr. Robertson: We offer in evidence the deposition of Frank Hufferd.

(The deposition above referred to, offered, received and read in evidence, is as follows:)

FRANK HUFFERD, being of lawful age, and by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposeeth and said:

Direct examination.

Questions by F. J. Oyler, attorney for plaintiffs:

Q. What is your name, please?

A. Frank Hufferd.

Q. Where do you live?

A. 424 South Fourth Street, Iola, Kansas.

Q. Where are you employed?

A. Prime Western Smelter.

Q. How long have you lived in Iola?

A. Nineteen years the 4th of last August.

Q. What is your age?

A. Thirty-four years old.

Q. Did you ever work for the United Zinc & Chemical Company?

A. Yes sir.

Q. During what period of time—how long did you work there?

A. I worked there, I started in there when first started and worked about a year; then I quit; then I think was down to the Prime Western about that long; and then went back and worked until they shut down.

Q. Was you working there when they were tearing the buildings down?

A. Left when they started to tear the plant down.

Q. What part of the plant did you work in?

A. About all over.

Q. Did you ever work in the acid part of the plant?

A. Yes sir.

Q. When did you ever work in that part?

43 A. About two and half years before they tore it down along about that time.

Q. You may state how the acid part of the plant was built: where the tanks were; and describe the place where the tanks were built?

A. Well there were lot of tanks there; there was what they called

the chamber building, all full of tanks; a building about 300 feet long, somewhere about that; and then there was another building here with other tanks in it; don't know how many; but tanks located all over the building, different tanks.

Q. What kind of acid did they manufacture there?

A. Sulphuric acid, 60 and 66 I think was the grades of it.

Q. What kind of process did they use, if you know, in the manufacture of the sulphuric acid?

A. They caught the smoke from the ores there; and they used—well there was lot of different things used—salt-peter.

Q. And did they use any nitric acid?

A. Yes.

Q. Did they use any caustic potash?

A. Caustic soda I believe they called it; helped unload a lot of that.

Q. Do you know where the basin or pool was where they had the sulphuric tanks—acid tanks?

A. Yes, sir.

Q. Just describe them if you will?

A. They were in this 300 foot building, was what they called the chemical building; and then the pump building, where the pumps were on the south of that; and then the kiln building was south of the pump building.

Q. Now have you observed since the buildings were torn down and removed any basin or pool of water out there within the rock wall?

A. Yes, sir.

Q. Was there any building over that at one time?

A. Yes, sir.

Q. Now that basin or pool there, whatever it is—

A. The building that set over that was what I called where the pumps were; that's where they pumped all the acid in those tanks; it was, don't know exactly, used to know just how big that was.

Q. Just give your best judgment?

A. 22 by 44 I believe.

Q. Now just describe how that was built; that building.

A. That building?

Q. I mean the basement there or pool whatever you call it.

A. Well it was the first wall, I think was about six feet, and then an offset where the pumps set, I think about six foot; that is the center was about six feet deeper.

Q. Then that would be about twelve feet from the top of the wall next to the east, is that right?

A. Yes, sir, just about twelve feet.

Q. Now what was the bottom of that basin or pool, what was it made of?

A. Concrete I believe the bottom of the center pool.

Q. What was the bottom of the second basement or pool?

A. Brick floor.

44 Q. Now where did the tank set in that pool as to the center or offset?

A. There was one set—I get those tanks mixed—the pumps set in the east end, and one set right at the door as you enter in the west end, right on the south side of the door; and then there were two tower tanks set on the south side of the pumps.

Q. Did they set on the first landing from the top of the wall?

A. All of them except one to the east end, it set down in the lower part.

Q. The deep part?

A. Yes sir.

Q. Now where were the pumps in that part?

A. When you went in the west door, went down a few steps and had a platform walk back, about, I don't know, twelve feet east, and down a few steps on the platform were the pumps set in the center.

Q. What kind of acids were used in this place, if you know?

A. Well I can't tell you, only sulphuric acid, all I learned.

Q. What did they use to make the sulphuric acid in conjunction with the smoke?

A. Well they used this salts soda, something like that; kind of forgotten what the name of it was.

Q. And did they use nitric acid?

A. I think they did, shipped that in bottles of some kind.

Q. Did they use caustic soda or potash?

A. Something like that, some kind of soda.

Q. Came in boxes did it?

A. Yes sir.

Q. How large was this tank?

A. Two of them was awfully large; don't know how much the would hold.

Q. Did they set upright?

A. Yes. The ones in the east end I would say was ten foot high and one in the west end, two round tanks, ten foot deep I would say; but the two tower tanks sixty feet high I would say.

Q. Did they extend up through the building, the tall ones?

A. Yes.

Q. Have you observed the place in the last year or two?

A. Yes sir.

Q. You remember the circumstances of the Britt boys being taken out of there, one dead and the other died soon after?

A. Yes sir.

Q. Had you seen the pond before that?

A. No sir, I never saw that pond, never close to the pond before that after the building was torn down.

Q. You know nothing about the condition of it?

A. No.

Cross-examination.

Questions by Baxter D. McClain, attorney for defendant

Q. There was no water in there when in operation?

A. No.

Q. All perfectly dry around there?

A. Yes sir.

Q. And there were couple of large tanks in the west end?

A. On the south of the pumps, two large tower tanks were.

45 Q. As you came in the west door here on this shallow basement, where were the tanks?

A. Was there on the south of the entrance to the elevator, that room was right straight south, and the first little tank set on the inside east of there.

Q. Tank on the west here?

A. No that was the office there.

Q. That is the chemical office?

A. That's where my boss used to s-ay, the chemical office was down at the other office.

Q. That was where the foreman stayed who superintended the making of this acid?

A. Yes sir, Dick Friebe.

Q. Did the shallow basement extend around long the south side of the building?

A. It was the same on the south as on the north, the deep part where the pumps were, it was about, well twenty-four feet long, I believe the deep part in this pit.

Q. Well these tower tanks?

A. Set up on the south side of this deep part.

Q. But on the extension of this shallow part around there?

A. Yes sir.

Q. Was any tanks east of this deep part?

A. On the east end of it.

Q. Were there any other tanks in that place?

A. No sir, chamber building set north of that.

Q. Now this particular basement was the basement to that big high part of the old United works?

A. Yes sir, the building.

Q. Then shed of buildings run north of that where this row of tanks were?

A. Yes sir.

Q. Now when the plant was in operation all of this basement, whether shallow or deep part—that was a stone or brick floor wasn't it?

A. Yes sir.

Q. And practically dry?

A. Yes, only when we turned the water in to wash it out.

Q. But no water was supposed to be in there?

A. No, only right in under the pumps.

Q. When they dismantled this plant, did they take these tanks all out?

A. Yes sir.

Q. Pumps?

A. Took everything out.

Q. Was there any place where the acid in any of these tanks or these pipes in this basement during operation, where it was exposed to the outside?

A. Well the white lead and stuff cleaned out of those tanks were poured outside and let it run away.

Q. Outside the building?

A. Yes, in a ditch and let it run off.

Q. And these acids were liquid?

A. Yes.

Q. And it was either in tanks or pipes?

A. Yes, sure, have to be in tanks.

Q. Did you ever see this basement after the water had gone in it?

A. Yes sir, once.

46 Q. Was that before this accident or afterwards?

A. The same day.

Q. Over there the same day?

A. Yes sir, after they took them out. I was the fellow called the pulmotor.

Q. Well, had you been there before that time after it was dismantled?

A. No sir.

Q. That's the first time you ever saw the water in there?

A. Yes sir, first time I ever saw the water in it.

Q. How far was the water to the top of the old foundation?

A. About six or eight inches I think, lacked that much being to the top.

Q. Where were you when you first knew of this accident?

A. I was north and west of there a little ways, don't know how far it was.

Q. Were you with these other boys?

A. Yes.

Q. And the little boys had passed you going south?

A. Yes, going kind of south and east.

Q. From the building?

A. Yes.

Q. You were not a chemist out there?

A. No, I was lead burner helper.

Q. You were a lead burner?

A. No, just helped him.

Q. You were helper to the lead burner?

A. Yes sir.

Q. And what you have testified to about this acid and chemicals was only your impression from working around there?

A. Only what he told me.

Q. You don't pretend to know what the different things were?

A. No, couldn't tell one from the other.

Q. Just what you picked up while working there?

A. Yes.

Q. Where were these little boys when you first got over there?

A. I never saw them when first got over there, those little boys.

Q. Just tell what you first saw?

A. First thing I saw was the Kaw Paving machine, fooling around over there and then went over north.

Q. And then went over north?

A. Yes, north to the Katy road.

Q. How close were you to the basement when you heard these boys?

A. I don't know the exact distance, about 75 yards, about that I expect.

Q. Did you go back there—back to where they were?

A. Yes, run right over there.

Q. How many boys were there when you got there?

A. I saw three when I got there, I saw three boys.

Q. Any of them in the water?

A. There was two in the water, my nephew got one out, just taking him out when I got there, and another little boy—little bit of boy standing to the right where this door went in to the west end going in the water, and one on the bank pulling on his clothes.

Q. When did you find out another boy was in the water?

47 A. When the little boy standing in the left and said something; kind of hard to say what he said but will if you want me to.

Q. Don't know as it would be competent, only hearsay. He was the one said another was in there and the little fellow and another one went in after him?

A. Yes, three or four diving in after him.

Q. Other persons come up in the meantime?

A. Three or four; three I am sure from the Kaw Paving machine came over there.

Q. But the little boy that was on the outside was putting on his clothes?

A. Yes, one was putting on his clothes.

Q. Did he look as if he had been in the water?

A. Yes, crying and holloing.

Q. And the little boy in the door still had his clothes off?

A. Yes, holloing at us about this other boy in there.

Q. And the boy your nephew got out had his clothes off?

A. Yes sir.

Q. Now did the little fellow they finally got out and was dead when took him out, did he have his clothes off?

A. Yes, that's when I went over after the pulmotor just as he fetched him out.

Q. Could you hear the boy that your nephew took out say anything there?

A. I talked with him a little when he was in the buggy.

Q. You don't know anything of the appearance of this pool at the time those boys went in?

A. The appearance of it, what do you mean?

Q. Don't know whether it was clear, murky or anything?

A. No.

Q. How did it look when you got there, was it roiled up?

A. Don't know, didn't pay any attention to it, wasn't in it.

Q. Can you recall whether it looked as if it was muddy, oily, anything like that?

A. No, I wouldn't say because I don't know.

Q. Did you see these boys after they were taken away from there home?

A. No, not after they were taken home.

Q. Do you know who those other boys were there with these boys?

A. No, I don't know.

Redirect examination.

Questions by Mr. Oyler:

Q. You say you talked with the little boy that was taken out of the water, after he got out and was in the buggy?

A. Yes, went over to the buggy and talked to him a little bit.

Q. Well, I didn't even know you were there, I am going to take a chance—what did he say?

Mr. McClain: That's objected to as calling for hearsay evidence and asking a witness to detail a conversation with a deceased person, and therefore incompetent.

The Court: Let it be sustained.

Mr. Robertson: Plaintiffs except.

Mr. Robertson: I offer in evidence the deposition of Arthur Burnett.

(The deposition above referred to, offered, received and read in evidence, is, as follows:)

ARTHUR BURNETT, of lawful age, being by me first examined, cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposeth and said:

Direct examination.

Questions by F. J. Oyler, attorney for plaintiffs:

Q. State your name, please?

A. Arthur Burnett.

Q. Where do you live?

A. East Iola.

Q. How long have you lived in East Iola?

A. About ten years.

Q. What is your business?

A. In the wood business this winter.

Q. Well you are cutting and hauling wood to town to sell?

A. Yes sir.

Q. Do you know where the old United Zinc & Chemical plant was located?

A. Yes sir.

Q. Do you know whether or not they manufactured sulphuric acid there?

A. Yes sir, I think they did.

Q. You may state if you were ever about the plant when in operation, or about the grounds after the buildings had been removed?

A. After the buildings had been removed.

Q. You may state if you ever observed a pool of water there where the buildings or some one of them had been standing?

A. Yes sir, pool of water there.

Q. You may state if you remember the circumstance of the two little Britt boys being taken out of there?

A. Yes sir, I helped get them out.

Q. Were you present at that time, you say?

A. Yes sir.

Q. You may state if you had ever observed that pool of water prior to the time the Britt boys were taken out of there?

A. Yes sir.

Q. Did you go in the water that day yourself to help get the boys out?

A. Never went in as they did, they jumped in the old vat, but I never went in there.

Q. Did you go in the shallow part?

A. Yes sir.

Q. Why didn't you go in the deep part?

49 By Mr. McClain: Defendant objects as conclusion of the witness.

Q. Did you have a reason why you didn't go in that deep part?

By Mr. McClain: Same objection.

The Court: That is perhaps calling for a mere opinion, objection sustained.

Mr. Robertson: Plaintiffs except.

Q. What I want to know is were you ever in that pool of water before the Britt boys were in there?

A. No sir, I knew what was in it.

Q. How did you know what was in it?

A. Because I knew that was where the acid come from and going through there it would eat your shoes and overalls.

Q. As I understand you were only in the shallow part, that is the first bottom from the wall?

A. Just a small pit in the center of it where it was deep.

Q. Now just state what part of the water you went into, Mr. Burnett?

A. Went in the edge of it on the west side of the pipe, pit runs clear across.

Q. How long were you in there?

A. Probably three or four minutes; long enough to help pull one of them out.

Q. What effect did that water have on you, if any?

A. Just itched and burned.

Q. Did you have your clothes on?

A. Yes sir, left mine on.

Q. Now to what extent did it itch and burn you, and what part of your body did it effect?

A. Just what part was in the water.

Q. How deep was the water where you went in?

A. Probably a foot.

Q. You may state whether or not it made your feet and legs sore?

A. Just burned and stung. Can't tell hardly how the burning felt; and when I changed my socks and washed my feet, was all right then.

Q. How long after you were in there until you changed your shoes and socks and washed your feet?

A. About an hour; stayed there with the pulmotor and tried to bring that one to.

Q. Did you observe the little boy that was taken out upon which they used the pulmotor?

A. Yes sir, I helped use it.

Q. How long did they work with that little boy?

A. Right close to an hour.

Q. You may state if you observed the condition of his boy, his breast and arms, or any portion of him when working with him?

A. Nothing only his hands was all.

50 Q. Well you may state if he was covered up with a blanket or anything to keep the heat in the body?

A. No.

Q. Well did you observe any burns or blisters or anything on him?

A. No sir.

Q. You say you just saw his hands?

A. That's all, hands and his face.

Q. Who brought the pulmotor there?

A. Creason, fire chief.

Q. And what doctor, if you know?

A. Well I couldn't say and I knew at the time.

Q. Was it Doctor Leavell?

A. Think that was him; know it was.

Cross-examination.

Questions by Mr. Baxter D. McClain, attorney for defendant:

Q. Where do you work now?

A. Am cutting, hauling wood to town, north of town, five miles from here.

Q. Well prior to that what did you do?

A. Run a dray here.

Q. How long did you run a dray?

A. Three years.

Q. How do you spell your name?

A. B-u-r-n-e-t-t.

Q. Where do you live?

A. East Iola.

Q. Whereabouts?

A. 225 South Vermont.

Q. Did you ever work at this United Zinc and Chemical Plant?

A. No sir.

Q. Don't know anything about the work there?

A. Know something about the work; been there several times but never worked there.

Q. Well do you know anything about the acid manufactured?

A. Why yes, they made acid there.

Q. How do you know that?

A. That this was acid?

Q. Your answer was yes they made acid there, how do you know that?

A. I worked at the Prime Western and there is a ditch running down between it and the Prime Western *and*, and have been in there and it eats your clothes, shoes, overalls.

Q. Acid run down the ditch between the Prime Western tract and the Zinc & Chemical Company tract—tract of land?

A. Yes.

Q. Which way does that ditch run?

A. North and south.

Q. And what kind of acid is it?

A. This white looking acid.

Q. Know the name?

A. No.

Q. Well what else do you know about it that makes you conclude it was acid?

A. That's all.

Q. You don't know whether there was any acid in this basement when they were operating or not, do you?

A. No sir.

Q. You don't know what was in that basement when it was in operation?

A. No sir.

Q. And when you use the term vat, what do you mean?

51 A. That depression where it goes in the ground.

Q. You don't know what was kept in there during the operation?

A. No, never was in it.

Q. Now you never saw this basement filled with water there prior to this injury had you?

A. Yes sir.

Q. What was the appearance?

A. Looked like a pool of water until you get to the center—that deep place in there.

Q. What was the color of it?

A. Pretty near the color of any other water, couldn't tell the difference in the water, could see clear down into it, looked clear.

Q. And how long before this injury had you been there?

A. I have been all over there several times, lived just a little ways from there, been through there dozens and dozens of times.

Q. How did you go through?

A. Walked through.

Q. Yes, I understand that, but what direction?

A. Coming from the south going north to the other railroad track.

Q. Where do you live from there?

A. 225 South Vermont, straight across from there south.

Q. South Vermont, would be south of the road running east and west, south of the street railway track, wouldn't it?

A. Yes.

Q. And where would you be going when going through there?

A. Over to the other railroad track.

Q. To work over there?

A. Yes.

Q. Where were you working?

A. Shucking corn, all kind of work.

Q. When did you first observe water in there, Mr. Burnett, with reference to this injury?

A. Couldn't say as to that, never paid any particular attention to that, never did think anything about it.

Q. Did the water come up to the top of this foundation?

A. Not quite.

Q. How close would you have to get to this foundation before you could see the water in it?

A. Oh, would be probably block and half in the right direction.

Q. I mean in coming from the south?

A. Coming from the south could see it a block, I have an idea, before they filled it up.

Q. Wasn't there some piles of refuse and stuff on the south to prevent seeing it as quickly there as you could from the north?

A. Yes sir, looked like brick and stuff piled up there.

Q. But you couldn't see this water there in the basement until you get on that land?

A. Until you get even and could see across.

Q. I mean until you got on that land?

A. Oh, yes, on the smelter land.

Q. That's to the east?

A. Yes.

52 Q. But I mean from the south?

A. No couldn't see it from the south, hid by the bricks.

Q. And you say standing in that water there it produced a burning sensation, and when you changed your hose and took your shoes off, that ended it.

A. Yes sir, and bathed my feet.

Q. Did you get your hands in it?

A. Yes sir.

Q. And was it clear when you were standing there?

A. Well it was clear until after they got to diving down in there, and got roiled up, kind of yellowish color and you couldn't see then.

Q. Prior to this injury they had dismantled this plant, tearing it down?

A. Yes sir.

Q. Who was with you when you came there?

A. There was Ernest Dalton, Doc Hufferd, Jake Lee, and then there was three or four people coming from that asphalt machine, working over there.

Q. And you were in the crowd that passed the boys just little while before they came down there?

A. Yes, boys were over where we were just before they got drowned.

Q. Do you know where those boys lived?

A. No, I don't know.

Q. Do you know who those other two boys were beside the Britt boys?

A. No.

Q. Do you know where they live now?

A. No.

Q. You say the boys had been down to the Kaw Paving Company's plant there?

A. That's where I think they were; been going there watching them making that asphalt.

Redirect examination.

Questions by Mr. Oyler:

Q. Do you know how long before these Britt boys were taken out of that pool it was when you were there the last time?

A. Which when I was there after they were taken out?

Q. No, before when you say you saw the pond several times?

A. Yes, saw the pond several times.

Q. How long before did you say you saw this last?

A. Some where in the neighborhood of two months, something like that, near as I can say now; been through there so many times kind of hard to state that.

Q. You may state if the pond was full of water for any length of time before the accident to the Britt boys?

A. Been full of water ever since enough rain and filled up.

Q. Now what kind of water was it, clear, muddy, prior to that?

A. It was clear.

Q. Now on coming from the west or southwest how far could they see that pool of water?

A. If coming from the south couldn't see very far.

Q. From the southwest?

A. Don't believe you could see awfully far from that direction either, brick around there almost.

Q. Now the obstruction, or things to obstruct the view was really at the southeast corner of the pool?

A. Pretty nearly plumb across there.

Q. On the south side?

A. Yes.

Q. But would it obstruct the view coming from the southwest?

A. Could see it a little quicker from the southwest; if you come

in more from the west wouldn't have to be so close, but from the south have to be 50 or 75 feet.

Recross-examination.

Questions by Mr. McClain:

Q. Do you know where these Kaw Paving Company operating were there, on whose ground it was?

A. Well, yes, believe it was on that same ground, smelter ground.

Q. How far would you say it was from there up a little east and north direction to where this basement is?

A. Near as I could say two blocks.

Mr. Robertson: We offer in evidence the deposition of Mr. Walter C. Davis.

(The deposition above referred to, offered, received and read in evidence is as follows:)

WALTER C. DAVIS, of lawful age, being by me first examined cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, *deposeth* and said:

Direct examination.

Questions by F. J. Oyler, attorney for plaintiffs:

Q. Mr. Davis, where do you live?

A. 911 North Walnut, Iola, Kansas.

Q. How long have you lived in Iola, Kansas?

A. Made my home here 21 years.

Q. You have recently been working at Van Buren, Arkansas?

A. Yes, sir.

Q. But your family lives here all the time?

A. Yes sir.

Q. You may state if you used to work at the United Zinc & Chemical Company?

A. I did.

Q. How long did you work for them, Mr. Davis?

A. I worked for them little over nine years as foreman out there.

Q. You say you worked as foreman?

A. Foreman, yes sir.

Q. What different parts of the plant did you work in?

A. I handled the yards foreman, power, crusher rooms.

54 Q. You may state, Mr. Davis, when you quit working there?

A. Well, sir, I don't know, I can't say.

Q. Well did you work there until they ceased operation?

A. Oh, yes sir, I stayed there and finished tearing all down but the acid department, the tower building and chamber building.

stayed until they took the furniture out of the office, that was my last work there; but can't say exactly what time it was.

Q. You may state, Mr. Davis, what did they manufacture there?

A. Sulphuric acid in the acid department.

Q. Did they also manufacture spelter?

A. Yes sir.

Q. Now you may state if you ever had an occasion while you worked there to be in the acid department?

A. I had many times.

Q. You may now state how the acid plant was built, that is that portion where the tanks were and with reference to the basin or pool where they had those tanks?

A. Well what we called the cellar, the tower building, that was nothing but a big cellar built there, that was the starting of the tower: three towers there, about 71 foot high in the center of this cellar, and other pit built there where the boilers were for forcing the acid after passing through the chamber building, and back through there to the storage tanks.

Q. You mean the pumps?

A. The pumps were on top, but the cylinders were down here in this pit.

Q. Now how many tanks in this cellar as you estimate it?

A. There were no acid tanks.

Q. What did they have in there other than the pumps?

A. That's the starting of the three towers.

Q. Well didn't they have a tank on the west of this cellar, and also one on the east of those towers, upright tanks, storage tanks or whatever you call them?

A. They were as much as 120 or 125 feet from the chamber building west, over next to the track there were storage tanks to load the acid in and load in the cars.

Q. I understand, but in the pit where that manufactured whatever kind of acid there was, didn't they have a tank on either side?

A. There was a small tank maybe held eight or nine hundred gallons of water to keep the worms cool, when the acid passing through them.

Q. How many tanks?

A. Maybe a tank to each tower.

Q. What kind of acid did they manufacture there?

A. Sulphuric.

Q. You didn't work in that part did you, in the manufacture of that acid?

A. No sir, I was called through there, in there every day, sometimes two or three times, just as I would be called to perform some kind of work. If they wanted any help — come to me.

Q. You don't know anything about the kind of chemicals used to manufacture this sulphuric acid?

A. Fumes of the smoke, water and some kind of acid.

Q. You don't know whether they used caustic potash?

A. No sir.

Q. You say you don't know.

A. I don't know.

Q. How large a place was this basement you speak of, if you have an idea?

A. Oh, maybe 150 by 40, might have been 150 by 50, I don't know.

Q. You never measured it?

A. No sir.

Q. Just your recollection?

A. Just my recollection, never been on the plant since — left there?

Q. You didn't help to tear down the acid or tower building?

A. No sir.

Cross-examination.

Questions by Baxter D. McClain, attorney for defendant

Q. There was a basement under all the tower building?

A. Yes.

Q. Then in the center of it there was a second basement?

A. Yes sir.

Q. Down in there were pumps and other paraphernalia used to force the acid in the towers in the storage tanks?

A. Yes sir.

Q. Where did the acid come from into the towers?

A. It came from the chamber building.

Q. The kilns stood right down along about there?

A. The kilns stood right down about there, there was a dust chamber in here (indicating) there was the acid department right in there, came along in here, there was the dust coming in here, then began to mingle with the water, went up that tower. That tower is all built and loaded full with square brick. Divides off here and a lot of tiling in there, and all set on end, passes through there and then comes down there to the second tower, then it passes up through the chamber building; that were about 425 foot long; that where it comes back down into this pond, pit you know, then it's got to be acid and then into this storage tank.

Q. Where were the storage tanks with reference to this building?

A. Well about 150 feet.

Q. Which direction?

A. West.

Q. Outside the building?

A. Yes, outside the building, not in touch with the building at all, not connected with the building, only the pipe.

Q. In all this operation, beginning with the dust when it first starts in, the way it passes all through this process, it is all enclosed?

A. Yes sir, all enclosed.

Q. And no liquid to it until a sufficient amount of water has been added to it to make it liquid?

A. Yes sir, something like that; goes through this chamber building; so much water carried to that chamber building, so many inches

and the smoke in there, added to the smoke in there, I don't know how.

56 Q. So these two tanks in this basement were water tanks?

A. Yes sir.

Q. And the only places the acid enters was when coming out of this tower?

A. And that's in worms.

Q. That's in iron worms?

A. Lead worms.

Q. And went over to the chamber building?

A. Yes sir.

Q. Then came back, that was all lead was it?

A. Yes, chamber all lead.

Q. Went through this pump and then over to the storage tank?

A. Yes sir.

Q. And that's all lead?

A. Every place the acid touched was lead, lead, earthen, or rubber.

Q. Was there any residue dumped around there that would contain acid that you know of?

A. Well not close.

Q. Where would it be dumped?

A. Clear to the north end of the yard; that belonged to me.

Q. How far was that to this building?

A. 400 feet north end of the lot to the Katy track.

Q. Could the surface water run from where you dumped this into this basement?

A. Could after shut down, couldn't before shut down; dug a ditch to carry off the surface water.

Q. Which way did it run from there?

A. South to the creek.

Q. That's between the Prime Western and Zinc Company?

A. Just over the fence and east line.

Q. Where did that residue come from?

A. Out of the nitric room.

Q. Where was that?

A. That was like this was the tower room; the nitric room was there, northwest of the tower building.

Q. How far?

A. Twenty-five feet.

Q. What was the nature of that residue, solid?

A. Solid when hauled out, like soft soap until it caked, and then take it up there.

Q. How far would you say it was from where this basement was?

A. Four hundred feet.

Q. What was in between there, Mr. Davis, in the way of retorts and so forth?

A. Nothing.

Q. What was between there at the time you dismantled it as to brick, stones, foundation?

A. Nothing the last time I was there, that yard was all clean from where I dumped that to the tower building.

Q. Now what I am getting at—was this place you dumped west of the extension of this, what do you call this building?

A. Chamber building. Just right west to the north end of it.

Q. At the time you left they hadn't torn down the tower building?

A. No sir, not the tower building, chamber building or anything pertaining to the acid department hadn't been touched.

57 Q. This residue was the nitric caked?

A. Yes.

Q. Was there any refuse or matter dumped around this basement?

A. No sir, never allowed anything dumped around there at all.

Q. What would be this stuff that would run down that drain, what would it look like?

A. Light colored, milky like color.

Q. That drain was kept open and it ran down to Rock Creek?

A. Yes, across the car line, right down to the south east corner of the United plant, you know.

Q. Well, that was the only refuse that came from this process that you know of?

A. Yes sir.

Q. This basement was perfectly dry when the plant was in operation?

A. Yes sir, floor perfectly dry.

Q. Assuming they dismantled this, what would they take away, would there be anything left there?

A. Nothing but the basement, that's all, cellar foundation, that's all; all that would be left.

Redirect examination.

Questions by Mr. Oyler:

Q. But you say after these buildings were torn down all except the tower building, that there was nothing to prevent this substance that you carried away 400 feet from running down this cellar way?

A. Yes sir.

Q. Was the cellar on lower ground than where you dumped out to the northwest there?

A. No foundation was higher than the cellar.

Q. How would it get in the cellar?

A. Go in over the northeast door into the cellar.

Q. There was a door there?

A. Yes and threw stuff in the drain, stuffed the drain up, didn't care anything about it any more I suppose.

Q. You mean this drain that they had had there run off down toward Rock Creek was filled up?

A. I suppose it was filled up. I don't say it was filled up, I just suppose it was.

By Mr. McClain: Defendant asks that this answer be stricken out as stating a conclusion.

The Court: Motion is sustained, it will be stricken out.

Mr. Robertson: Plaintiffs except.

Q. As I understand this sulphuric acid, from your statement finally after it got in the form of sulphuric acid was then carried back in this pump in the pit?

A. Yes sir.

Q. And by this pump or whatever process it was, was then pumped out in the storage tank?

A. Yes sir.

Q. What were these tower tanks for?

A. That's the making of the acid.

58 Q. That's where the acid is made in the tower tanks?

A. Some process going through those tanks.

Q. And they were all in the pit?

A. They were all close and tight.

Q. Of course you were not there when they were torn down and don't know how much of this acid was left in the pit when those tanks were torn out?

A. No sir.

Q. Well now the question is, do you have any knowledge from the machinery, the way it was constructed and your observation whether or not there would be any sulphuric acid left in the tanks or towers when they were taken down?

By Mr. McClain: Objected to because it calls for conclusion of the witness and therefore, incompetent.

The Court: Objection overruled.

Mr. McClain: Defendant excepts.

A. I don't know.

Recross-examination.

Questions by Mr. McClain:

Q. Where do you say you live now?

A. North Walnut.

Q. And where you working?

A. Van Buren, Arkansas.

Q. When did you come up from there?

A. Three days ago.

Q. Come up in response to——

A. You know Wanda Davis; you know Wanda don't you? I am Wanda's father.

Q. And you came up to give your deposition here?

A. I did not.

Q. How did you come to know about this matter.

A. Well party wanted me to come up here.

Q. In connection with this case?

A. Yes sir.

Q. And that's how you came to be here at this time?

A. No sir, didn't know nothing about it at this time.

Q. You have volunteered this information you testified to before.

A. No. I was somewhere in Oklahoma before, or when they were

drowned or something, and I came home and some old man asked me why I wasn't on the case, and said if I had been here I would have been on the case. I was only home four days and went back to Oklahoma and that's the last I heard of it before I come home this time.

Redirect examination.

Questions by Mr. Oyler:

Q. How did you happen to come home and be at home this time?

A. Wife telephoned me to come home.

Q. Because of some sickness in your family?

A. Yes sir, Wanda was sick, my daughter.

59 Q. And then I called you over the phone and asked you to come down this morning, after seeing in the paper where you were at home?

A. Yes sir.

Recross-examination.

Questions by Mr. McClain:

Q. Had you arranged to testify in this case before?

A. No sir.

Q. Well talk about it?

A. Well I just didn't have any intention of being on the case there was a witness said if I had been here I would have been on

Mr. Robertson: I offer the deposition of Luther D. Creason.

(The deposition above referred to, offered, received and read in evidence, is as follows:)

LUTHER D. CREASON, of lawful age, being by me first examined cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposeth and said:

Direct examination.

Questions by F. J. Oyler, attorney for the plaintiffs:

Q. You may state your name, please?

A. Luther Creason.

Q. Where do you live, Mr. Creason?

A. 805 South Walnut Street, Iola, Kansas.

Q. How long have you lived in Iola, Kansas?

A. About twenty years, I guess.

Q. What age man are you, Mr. Creason?

A. Thirty-three.

Q. What position do you hold in the city of Iola, if any?

A. Fire chief.

Q. How long have you been fire chief?

A. About four years.

Q. Do you know whether or not the city owns a pulmotor?

A. Yes sir, they do.

Q. How long has the city owned a pulmotor?

A. I judge about three years.

Q. Who has charge of it?

A. I have.

Q. And how long have you had charge of the pulmotor?

A. Well ever since they had it.

Q. You may state if you have used the pulmotor?

A. I have.

Q. How many times would you say you have operated or used it on persons since you have had charge and control of it?

A. Forty-eight times.

Q. Do you remember the circumstances of the little Britt boys being taken out of a pool out east of Iola?

A. I do.

60 Q. Do you remember the date, Mr. Creason?

A. No, I do not exactly, but I have the date, but don't remember it.

Q. Well I guess there is no question but what it was on the 27th of July, 1916, but if you don't remember the date that's all right—you remember the circumstances though?

A. Yes sir.

Q. Were you called there with the pulmotor?

A. Yes sir.

Q. Did you see either of the Britt boys?

A. Yes sir, I saw both.

Q. Did you use or operate the pulmotor on either of them?

A. On one of them.

Q. Do you know which that was, whether the oldest or youngest one?

A. Couldn't say which; saw the two children when I got there and they put one in the buggy and took it away both about the same age.

Q. Did you pay any attention to the one taken away in the buggy?

A. No sir.

Q. Did you operate the pulmotor on the other one?

A. Yes sir.

Q. Now tell the condition you found the boy in?

A. Well when they called me out there with the pulmotor they had the boy out and was on the bank of the pool; and I started to put the pulmotor on him; had to open his mouth to get the phlegm out and when opened his mouth found his tongue was swelling and seemed to be burnt in kind of a crisp; I finally got his mouth cleaned out; got the pulmotor working all right; run it there a few minutes and he began to gasp like and took the pulmotor off; and when I took it off he went back; and we tried it again, and then there would be a gush of this water and stuff come up, and couldn't do any good. His body had red spots all over from the knees up.

Q. What kind of spots?

A. Well reddish looking spots; looked like from a burn, something of that kind.

Q. How large would these spots be?

A. As large as a dime to a nickel.

Q. Would it appear to be blistered or burned?

A. Yes sir.

Q. Now you say when you first opened his mouth and before you arranged the pulmotor to use it, his tongue was swollen?

A. Yes sir.

Q. And to what extent?

A. Well it was swollen pretty thick.

Q. State what it continued to do, if you know, the tongue, what condition did it continue to get in, different from that?

A. I would judge it burnt to a crisp, and began to get stiff directly we got there, it was thick you know.

Q. Have you used the pulmotor on other persons that were taken out of the water drowned?

A. Yes sir.

Q. You may state if you ever observed any other person whose tongue was burnt and swollen like this boys was that was taken out of the water?

61 A. I have worked on one man taken out of the river and his tongue was not in no condition like this boy's was.

Q. What do you mean by that?

A. It was not swollen and had right color to it.

Q. You say the water run out of this little boy's mouth, run down on his lips and side of his mouth?

A. Yes, on the side of his mouth.

Q. Notice any discoloration this water made on his lips or mouth?

A. As far as I can remember it was dark, kind of muddy looking.

Q. You mean the water was?

A. Yes sir.

Q. What effect did it have on his lips or chin when it run down on his lips or chin?

A. I don't remember it having any effect on his lips.

Q. Did you observe his eyes, whether any of the water got in his eyes?

A. No sir.

Q. How long did you use the pulmotor on him?

A. Well I wouldn't say for sure, but I have an idea right along three-quarters of an hour or an hour.

Q. Of course, you used it as long as you thought there was any hope at all?

A. Yes sir.

Q. You didn't go in the water did you?

A. No sir.

Q. Did you examine the water any?

A. No sir.

Q. You paid no particular attention to the water?

A. No attention to the water whatever.

Cross-examination.

Questions by Mr. Baxter D. McClain, attorney for defendant:

Q. What did you do the first thing as far as this boy was concerned?

A. The first thing done when got there, got the pulmotor ready and opened the boy's mouth to get the phlegm out, if any?

Q. What phlegm?

A. The phlegm in the throat.

Q. Did anybody tell you anything about the boys before you began work?

A. No sir, knew nothing of it until we got there; got a call couple of boys drowned in the pond up at the old smelter grounds.

Q. Anyone tell you about it before you were adjusting the pulmotor?

A. No sir.

Q. You just went to work?

A. Yes, I saw this boy lying there on an old blanket and first thing I done when I got there I opened up the pulmotor, got it ready and opened his mouth to get it cleaned out and ready and went right to work on it.

Q. Any evidence of life in him?

A. Didn't appear to be any whatever.

Q. And none shown whatever outside of this gasp you speak of?

A. No, two different times he gasped.

Q. Couldn't tell whether that was normal or relaxation of the arms from his throat?

A. No, it was normal.

Q. Then he did have some life?

A. Yes sir, my judgment there was some life there.

Q. Did he breathe?

A. Yes sir.

Q. How long did he continue to breathe?

A. Well he took two or three breaths anyway; this pulmotor is so arranged that whenever get a breath the pulmotor quits work.

Q. How often did that occur?

A. That was twice.

Q. Did you observe, Mr. Creason, whether or not the body had been manipulated so the water had run out of his inside?

A. No sir.

Q. Water in there still?

A. Well there was water in there, found after using the pulmotor; but of course heard the other boys say had let the water out; that is hearsay.

Q. And when opened his mouth, you say his tongue was discolored?

A. Yes sir.

Q. What color?

A. Black.

- Q. Were his lips black?
- A. Well his lips were dark; they weren't as black as his tongue.
- Q. Was his nose black?
- A. I hardly believe it was.
- Q. And you say that there were red spots on his body?
- A. Red spots from the knees up.
- Q. From the size of a dime to a nickel?
- A. As large as a nickel.
- Q. Had it come to a blister?
- A. Yes sir, hadn't swelled up to any size, enough you could slip it off with the thumb.
- Q. Well you tried that did you?
- A. Yes sir.
- Q. Where was that now on his body?
- A. There was one on his arm, one on his left side in here, another down here I believe on his left leg.
- Q. How far up on the body did this extend?
- A. Up on to his neck I believe.
- Q. Up on the shoulders?
- A. Yes, up to his neck.
- Q. Any on his hands, did you notice?
- A. Don't believe there was.
- Q. None on his feet?
- A. No didn't appear to be any on his feet; from his feet up to his knees; seemed he was bare footed and the hide was tough.
- Q. You say you never treated but one other drowning person?
- A. One is all.
- Q. Wasn't his tongue swollen?
- A. No sir.
- Q. Isn't that a usual condition you find in drowning people that their tongue is swollen?
- A. Well I couldn't say, those two are the only two I ever worked with; but as far as I can remember this fellow drowned down here his tongue didn't look to be swollen a bit.
- Q. Did they talk to you while working this pulmotor?
- A. Well good many people there and everybody talked, didn't pay any particular attention to anybody; everybody was excited.

63 Redirect examination.

Questions by Mr. Oyler:

Q. How many of those blistered places that you have mentioned were on his body, just give your best estimation, any more than those you rubbed the skin off, as you say?

A. Yes sir, there was several over his breast and back.

Recross-examination.

Questions by Mr. McClain:

Q. Just locate them the best you can, that is in addition to the ones you have already located?

A. Well they were just all over, just here and there.

Q. But there were no solid mass of red?

A. No, no sir.

A. R. SLEEPER, called as a witness on behalf of the plaintiffs, having been first duly sworn, testifies, as follows:

Direct examination.

Questions by Mr. Oyler:

Q. State your name and place of residence, please?

A. A. R. Sleeper, Iola, Kansas.

Q. How long have you lived there?

A. Thirty-two years.

Q. What is your business?

A. Furniture dealer and undertaker.

Q. How long have you been engaged in the undertaking business?

A. Be sixteen years the second day of June this year.

Q. Do you remember the circumstances of the two little boys being taken out of the pond or pit east of Iola a year or so ago?

A. I do.

Q. Do you remember the date?

A. It was the last of July, 27th or 28th.

Q. Twenty-seventh or twenty-eighth of July?

A. Yes, 1916.

Q. You may tell the jury if you went down there where the boys were after they were taken out of the pool or pond?

A. I was called to bring the ambulance out, that there had been an accident, one boy was drowned; and I went out with the ambulance and found one boy dead; put the boy in the basket, and the other boy was not there, I didn't see him, but the father was there, Mr. Britt.

Q. Now you found the one little boy there you say?

A. Yes.

Q. What did you do with him?

A. Put him into the basket in the ambulance.

Q. Where did you take him?

A. Took him to the morgue.

64 Q. Did you prepare the body for burial?

A. I did.

Q. Just describe to the jury the condition the body was in as to being burnt places, sores, blisters or blemishes? Whatever you call them, on the body.

A. Well the boy had several sores you might call them, or blisters

on his body; they were small, about the size of a thumb nail, or something like that, is my remembrance of them. He had them on his shoulder as I remember it now, there was also a place on his right knee that I recall as I examined that one, remember that one in particular.

Q. Now did those places appear of recent origin or were they old sores?

A. No, they were new sores, not old.

Q. What was the condition of his mouth and eyes if you noticed?

A. I paid no particular attention to his mouth nor to his eyes, I cleaned his eyes out and closed them, seemed to be normal as I remember them.

Q. What was the condition of the mouth, any water or stuff run out of the mouth?

A. Well, of course, they used the pulmotor on his mouth, and I had to close his mouth; his lips were rather dark, but that is the usual condition in cases of that kind.

Q. Now were there any streaks on either side of the mouth, did you notice?

A. Not that I remember of.

Q. Did you see the other boy?

A. I did.

Q. Where was he?

A. I was on my way to the morgue with the first boy; I went by the home on North Fourth Street—

Q. That is, the home of Mr. Van Britt's brother?

A. Yes, wherever the boy was taken, either where he lived or his brother, that is where the boy was.

Q. You saw the other boy there?

A. Yes I saw the other boy at the house.

Q. Did you examine and talk to him?

A. I did.

Q. Describe to the jury his condition and what you saw there?

A. Well, I went by the house and stopped in order that I might talk to the father again as he had left before I left with his first boy that was drowned; and I went to the house, and it was a small room on a west front, and there was folks in the windows and in the house the place was full of folks, and everybody was giving orders around what to do, and the boy was laying there on the bed; he had his clothes on, some clothes on, I remember that, and he was in a great deal of pain; and I asked them what they had done for the boy; well, they said there had been a doctor there.

Mr. McClair: We object, if your Honor please.

Mr. Oyler: You can't tell what was said, but what you saw and the manner of the boy.

A. The boy was laying there on the bed and he was asking his father to do something for him.

Q. Was he giving any evidence of pain or suffering?

A. Yes, had what I call convulsions.

65 Q. Describe to the jury what he would do?

A. He would all tie up in a knot and gasp for his breath, he couldn't get his breath. And he would have those convulsions lasting for a minute or two and then he would relax and lay there and seem to be normal and then he would go into a convulsion again.

Q. What was finally done with the boy, if you know, taken any place?

A. I talked to the boy and told him——

Mr. Oyler: You can't tell what you told him; tell what you did?

A. I took the boy to the hospital. Sutcliff's hospital.

Q. What time in the day was that, Mr. Sleeper?

A. About seven o'clock that evening.

Q. About seven o'clock in the evening?

A. Yes.

Q. And what was his condition when you got him out there?

A. Seemed to be normal.

Q. When did you next see him?

A. After he died.

Q. Did you also prepare that body for burial?

A. I did.

Q. Do you know what time he died?

A. He died Saturday afternoon about three o'clock.

Q. And when were they buried?

A. Buried on the 30th day of July.

Q. Where?

A. In Highland Cemetery.

Q. At Iola?

A. Yes.

Cross-examination.

Questions by Mr. McClain:

Q. Dr. Sutcliff conducts a private hospital there, of his own, does he not?

A. Yes.

(Witness excused.)

G. M. LAMER, called as a witness on behalf of the plaintiffs, having been first duly sworn, testifies, as follows:

Direct examination.

Questions by Mr. Oyler:

Q. Where do you live?

A. Iola.

Q. What is your business? Or profession?

A. Teacher of science.

Q. Where teaching?

A. Iola, High School.

Q. How long have you been teaching there?

A. This is my second year.

Q. Were you in Iola in July, 1916?

A. I was.

Q. Are you related to Doctor Sutcliff?

A. Brother-in-law.

Q. Were you staying at his residence or home at that time in 1916?

A. I came there visiting about the 29th of July.

Q. 1916?

A. 1916.

66 Q. You may tell the jury if you went with Doctor Sutcliff to a pool or pond of water on the United Zinc and Chemical Company ground east of Iola for any purpose?

A. We did.

Q. When did you go there?

A. Tuesday following this accident.

Q. You learned of the accident after you went there?

A. I did.

Q. For what purpose did you and Doctor Sutcliff go to this place?

A. To procure a sample of the water of this pool.

Q. Did you procure it?

A. We did.

Q. How did you get it and where did you get it?

A. We took a jug, weighted the same, put a cork in the mouth of the jug to which was attached a line; we suspended the jug over the center of the pond, causing it to sink to the center, in the center of the pond, the middle excavation, pulled out the cork, allowed the jug to fill, drew the jug to the surface and recorked it.

Q. Do you know what was done with that jug of water?

A. That was locked in Doctor Sutcliffe's inner office and later by him sent to Professor Bailey, University of Kansas, for quantitative analysis.

Q. Describe this pool of water when you went out there on Tuesday after these little boys were taken out on Friday?

A. The dimensions of the pond are forty by approximately ninety five feet.

Q. Did you measure it?

A. Not at that time.

Q. Have you since measured it?

A. I have.

Q. And what were its correct dimensions?

A. Forty by ninety-four.

Q. Describe its appearance generally, what it was then?

A. The pond was excavated in two levels; an outer excavation and an inner excavation or sub-basement; the water in the outer excavation was about two feet deep; the water in the inner excavation was ten or twelve feet deep; I am not sure as to the exact depth it was very clear, and on the bottom of this pond was a sediment or precipitate, yellowish in appearance.

Q. Did you taste this water or make an examination of it?

A. Superficial examination of it, yes.

Q. Have you had any special training or experience as a chemist?

A. I have.

Q. To what extent?

A. I hold degrees from the University of Kansas and Yale Col-

lege.

Q. Now tell the jury what tests or experiments you made with this water?

A. Superficial tests of the sample showed zinc sulphate and sulphuric acid in appreciable quantities, to what extent I do not know.

Q. You did not make a thorough test?

A. I did not, not equipped for quantitative work at all, only a superficial test.

Mr. McClain: If the court please, we ask this be stricken out as a conclusion of the witness.

67 The Court: No. He said he made no quantitative analysis because not equipped to do so, but he said it was there.

Mr. McClain: As I understood the witness he said he made only a superficial test.

The Court: As I understood you to say, there was sulphuric acid in this water?

A. In appreciable quantities, yes sir.

The Court: Let it stand.

Q. Now, are these poisons, do you know?

A. Zinc sulphate is a poison, all the soluble salts of zinc are poison; sulphuric acid is a corrosive.

Q. Mr. Lamer, I hand you Exhibit No. 1 which is supposed to be a picture of this pond of water, and I will ask you to examine it carefully and tell the jury if it is a fairly good view or picture of the pool as you saw it out there at the time?

A. It is a picture of the pool.

Q. Does it show the pool and the walls and the grounds there?

A. It does.

Q. Just as they were as you remember them?

A. Yes sir.

Q. You may state if there were any warning signs or danger signs, any fence or barriers to prevent any one from going into that place or to warn them of the danger?

A. There were no fences, there were no warning signs?

Q. I believe you said the water was clear, did you?

A. The water was very clear.

Q. At the top?

A. At the top.

Q. Now was there a road running north and south just west of this pool of water?

A. Yes.

Q. About how far west of that road?

A. One hundred to one hundred and twenty feet, approximately. I'm not sure as to exact distance.

Q. That is the road that runs west to Clayborne's mill?

A. It is.

Q. And runs north by the west side of the pool?

A. On the west side of the pool, yes.

Mr. Oyler: I desire to introduce in evidence this exhibit No. 1.

Mr. McClain: No objection.

(Exhibit No. 1, the photograph above referred to, offered and received in evidence, is attached hereto and made a part hereof.)

Cross-examination.

Questions by Mr. McClain:

Q. Have you ever conducted analyses of water and other materials for mineral substances outside of experiments?

A. Outside of experimental work?

68 Q. Yes?

A. Yes.

Q. I mean practical work?

A. Not as a practical chemist, no.

Q. Now your conclusion as to the acid showing in this water was from your superficial examination only?

A. It was not a complete quantitative test.

Q. Did you taste it?

A. I did.

Q. In regard to this road that you speak of, how did you go to this place?

A. Going out from Iola we turn to the left and pass over the interurban and a spur track of the Missouri Pacific which goes to the smelter, pass Clayborne's mill then go northward past the old road which I suppose ran out there.

Q. How far north of Clayborne's mill does that road turn east?

A. I can't say.

Q. There is a road all the way along the west side of this tract isn't there, of Mr. Clayborne's mill?

A. Yes.

Q. Then off of that north of Clayborne's mill something like fifty yards there is a tract goes out on this old site, and then farther north there is another road goes out, isn't there?

A. How much farther north.

Q. Well, one hundred yards probably?

A. I don't know about the one hundred yards Mr. McClain.

Q. Well, up where the old kilns used to be?

A. Yes there is a road running out where the kilns were.

Q. There was a railroad spur ran north and south from fifty to seventy-five yards west of this pool?

A. There is a spur track there somewhere, as to its distance from the pool I don't recall.

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EXHIBIT NO. 1.

Q. Was there a spur ran east and west along the south side of this tract some distance where the Kaw Paving Company had some work?

A. Yes.

Q. This pool, as you have called it, was a basement filled with water, wasn't it?

A. It was.

Q. Did you observe the character of the bottom as to whether it was covered with refuse and litter, etc?

A. There was debris on the bottom.

Q. That was plainly observable to any one that looked in?

A. Careful observation, yes, you could see it.

Q. Did you go into the water at all?

A. I did not.

Redirect examination.

Questions by Mr. Oyler:

Q. When the water was stirred by reason of sinking the jug at this time, you may tell the jury if you discovered an odor from the water?

A. The water was riled to an appreciable extent and the odor of hydrogen sulphate was very plain.

(Here follows photograph marked page 68A.)

Recross-examination.

Questions by Mr. McClain:

69

Q. Referring to that matter, that is decayed matter, was it?

A. I don't know that it was decayed matter or not; the odor of hydrogen sulphate was there, may occur in connection with decayed matter.

Q. In reference to what you did there in reference to this matter, you did that at the instance of Dr. Sutcliffe, he interested you in it?

A. Yes he asked me what I thought about the chemical analysis.

Q. I mean in getting the water?

A. He asked me to go along and procure a sample of water.

Q. And you did?

A. Yes, and turned the water over to him.

Q. And so far as what became of it after that, is what he told you?

A. It isn't a matter of hearsay; I saw the water placed in his office and locked up and saw it go to the University of Kansas.

Q. Saw it in what way?

A. I saw Dr. Sutcliffe remove it from the inner office and start to the University of Kansas with it.

Q. He took it up himself?

A. Dr. Sutcliffe took it up.

Q. How long after he got it?

A. It was taken down some time this spring, I can't recall the exact time.

Q. Been there since last August 1916?

A. Yes.

(Witness excused.)

Dr. J. S. SUTCLIFFE, called as a witness on behalf of the plaintiffs, having been first duly sworn, testifies, as follows:

Direct examination.

Questions by Mr. Oyler:

Q. Where do you live Doctor?

A. Iola.

Q. How long have you lived there?

A. Since 1904.

Q. What is your business?

A. Physician and surgeon.

Q. Are you a graduate of a standard medical school?

A. I am, from two.

Q. Are you registered in the state of Kansas to practice medicine?

A. I am.

Q. Also in Allen county?

A. Yes sir.

Q. Do you own and operate the Sutcliffe Sanitarium at Iola, Kansas?

A. I do.

Q. What official position do you hold there, if any?

A. County health officer.

Q. How long have you been county health officer?

A. Five or six years.

Q. Do you remember the circumstance of the Van Britt boys being taken out of the pool of water just east of Iola on what is known as the United Zinc and Chemical Company's grounds?

A. I do.

Q. Did you see either of those boys?

A. I did.

Q. Was either one of them taken to your sanitarium?

A. The oldest one was.

Q. About what time of the day was it he was brought there?

A. Along in the evening about seven o'clock.

Q. Do you remember what time in the year it was and what year?

A. It was in July, July 28, 1916.

Q. Did you examine the boy when he came to your sanitarium?

A. I did.

Q. Now just tell the jury his condition at that time and what his condition continued to be and what the result was.

A. The boy was in severe colicky pains, vomiting and gasping for breath; put him under an opiate on account of him gasping for breath; kept him on the porch where he could get plenty of air. The boy died the following day, on the 29th, as a result of swelling of the bronchial tubes and gastro intestinal irritation; irritation of the stomach and bowels, which produced an inflammation of the bowels and stomach.

Q. Did you make an examination to ascertain what brought about this condition?

A. I did.

Q. Tell the jury what you concluded?

A. On Monday morning—I live probably a mile east of this plant, the plant is about half way between my office and my hospital, where I live; on my way in on Monday morning I went out to look at the pool. I arrived at the southwest corner of the pool. It had a stone wall around it and this basement was probably two feet thick, or three feet deep; the water came up probably six or eight inches from the top; and the water appeared very clear; I bent over and took a little water in my hands and put it to my tongue. It had an astringent, metallic taste so I decided to take a sample of the water so as to examine it. On the following day as I came in from the sanitarium in the morning I took a gallon stone jug, put a line to it that would extend across the pool. There seemed to be a deep place in the center of the pool. Mr. Lamer was with me; he took hold of one end of the line and carried it down to the south end of the pool and I walked down on the north side; we tied a brick to this jug, inserted a cork with another string to it; this allowed the jug to go down to the bottom of the deep part; after it got there we jerked on the string that was attached to the cork and allowed the jug to fill with the water from the deep part of the pool; when we

did so, when the jug went to the bottom, there was a decided odor came up.

Q. What kind of an odor?

A. It was the odor of sulphated hydrogen. I took the water to the office with the intention of making a superficial examination myself; when I looked over the chemistry I found I did not have the agency necessary to test for sulphuric acid which I had reason to suspect was present.

Q. You had reason to suspect that from the condition of the
71 boy or what?

A. From the pungent metallic taste that it conveyed to my tongue and from the fact I knew a sulphuric acid plant had previously existed there.

Q. Tell the jury what you did with that jug of water?

A. I left the jug of water laying in my office for a long time.

Q. Was it sealed up?

A. Yes, it was sealed up tight.

Q. Tell the jury what you did?

A. And some time afterwards, I believe I told you I had it, and you asked me to send that water or to take that water to Manhattan.

Q. When you obtained this jug of water was you county health officer?

A. I was.

Q. What was the reason that you got it, had any one requested you to do it, or did you do it as a part of your official duty?

A. I did it as my official duty, and the child having died in the condition it did, I was anxious to know the cause of the death.

Q. You may tell the jury, in your opinion, what was the cause of that boy's death?

A. From irritating substances in the water that had gone into the lungs and into the stomach which set up an inflammation of both the linings of the bronchial tubes and an inflammation of the stomach. The irritation set up in the stomach caused the vomiting, one of the earliest symptoms that we would expect. The irritation set up in the bronchial tubes caused the swelling of the tubes and caused him to gasp for his breath, couldn't get sufficient fresh air into his lungs.

Q. Is sulphuric acid a poison?

A. It is an irritant poison; it kills by the irritation it sets up.

Q. Did you take this jug of water to Professor Bailey?

A. I did. I said a moment ago at Manhattan, it was Lawrence; I was on my way to Topeka; it was the University at Lawrence.

Q. Was the jug of water in the same condition when delivered to Professor Bailey as when taken out of the pond?

A. Just the same, never been out of the closet since the time I put it in there.

Q. Any other substance of any kind or character put in the jug?

A. No sir.

Q. Doctor, you say you saw the other little boy that died as a result of being in this pond?

A. I went down to Mr. Sleeper's morgue on Saturday, the day after the other boy that was alive was brought to my hospital.

Q. Did you examine the body?

A. I did superficially.

Q. Tell the jury what you saw and what you discovered there?

A. There was blebs on the right side of his leg and right arm; a bleb is a name we apply to a water blister; if you put a mustard plaster on it raises a water blister or a bleb; raises the upper layer of the skin, the epidermis; requires very little to break that bleb and allow the water to pass out. That will also occur from a burn, and that was the condition of these he had on that leg and arm on the right side.

72 Q. You say those were burns?

A. They were from irritation, not necessarily from a burn; a mustard plaster will do it, but you cannot say that is a burn. Most any acid will do it.

Q. You say certain acids will do it?

A. Yes, acids will do it.

Q. Will sulphuric acid if in water in sufficient quantities cause it?

A. Yes.

Q. That condition you found there?

A. Yes.

Q. Doctor, you heard the reading of the deposition of Mr. Luther Creason? Did you not?

A. I did.

Q. And you understand the condition of the little boy's tongue as described by Mr. Creason in his deposition when he attempted to use the pulmotor?

A. I do.

Q. Now, Doctor, after hearing the deposition of Mr. Creason and your own experience in examining and caring for the other boy that went into the water and was taken out and brought to your hospital, and your experience as a physician, and your knowledge of poisons generally, you may state to the jury your opinion as to what caused the death of the little boy that you saw at Mr. Sleeper's morgue?

A. Taking in this irritating water into the lungs would cause him to gasp and take in more of it and drown very readily.

Q. That is, the swelling of the tongue, would that be a natural result of drowning, the swelling, this swelling or parched tongue?

A. No, in drowning in clear water we wouldn't get a parched tongue, we would not expect swelling of the tongue until the body had been in the water a considerable length of time.

Q. What do you mean by a considerable length of time?

A. A day or two, until the putrefactive changes begin to take place; then we expect a swelling, not only of the tongue but other parts of the body.

Q. If you find a parched tongue in three-quarters of an hour after the party is taken out of the water, would you attribute that to drowning or to some other cause?

A. Some other cause.

Q. From an irritation of some kind you say?

A. From some severe irritant.

Q. Would the taking of this water into the mouth by this little boy tend to prevent him getting his breath or would it likely strangle him?

A. Yes, more likely to strangle him.

Q. And he would then by that method lose control of himself?

A. Yes.

Cross-examination.

Questions by Mr. McClain:

Q. When did you first hear of this accident?

A. By phone about six or seven o'clock.

Q. That evening?

A. Yes.

73 Q. Who phoned you?

A. I am not quite sure but I think it was Mr. Sleeper informed me they were bringing the patient out to the hospital.

Q. Where did you first see this boy?

A. When they brought him out to the hospital.

Q. Did you give him an examination?

A. Yes sir, I stayed right with him the most of the night.

Q. When with reference to his coming out there did you take this sample of water?

A. He came out Friday night, died Saturday, Monday morning on my way down I went and looked at the pond and tasted the water and Tuesday morning coming into town I stopped and took a sample of water.

Q. Had you ever seen that place before?

A. No sir.

Q. Didn't know it was there?

A. Didn't know that pond was there.

Q. Couldn't see it from the south road there?

A. No sir.

Q. The water was six or eight inches below the level of the outside wall?

A. Yes.

Q. Now this metallic taste that you speak of in evidence at the edge of the pond, west edge?

A. Right at the southwest corner, right on the corner is where I reached over and took the taste of the water.

Q. Did that water smart and bite there?

A. It didn't smart, it was a puckering taste, I spit it right out.

Q. Well, it would be noticeable at once?

A. Yes.

Q. Would there be any difference, Doctor, in the character of this water, from any other location in that basement?

A. Yes, if there was sulphates in it the specific gravity of sulphuric acid is twice probably that of water and it would naturally settle to the deepest part.

Q. As a matter of fact doesn't sulphates dissolve in water quickly, take on water?

A. It will mix with water.

Q. Does it not take it from the atmosphere, hasn't it an affinity, sulphate, to take moisture from any place it can get it?

A. Well, now, I am not a chemist enough to say that, but I do know the specific gravity of sulphuric acid is much more than that of water, twice that, and will go to the deepest part.

Q. Then your idea is, that there would be a stronger sulphuric condition, if there was sulphuric acid in that basement, at the lower part than there would be at the higher part?

A. Yes sir, that was the object I had in taking it from a deep spot of the water.

(Witness excused.)

A. A. STOCKTON, called as a witness on behalf of the plaintiffs, having been first duly sworn, testifies, as follows:

74 Direct examination.

Questions by Mr. Oyler:

Q. State your name, please?

A. A. A. Stockton.

Q. Where do you reside?

A. Iola, Kansas.

Q. How long have you lived there?

A. Lived there eleven years this last month.

Q. Did you ever work for the United Zinc and Chemical Company when they were operating their plant there?

A. Yes sir.

Q. How long did you work for them?

A. Well all told I guess I worked something like a year.

Q. Did you work for them after the plant had ceased operating and while it was being dismantled?

A. Yes sir.

Q. Did you do the last work that was done there about the acid pit or plant?

A. Yes sir.

Q. For the defendant company?

A. Yes I cleaned up and did about the last work done there.

Q. What was the last work that you did there?

A. The last work I done was shooting out some casting out of the cement piles the tower set on for the building.

Q. Who did you do that work for?

A. The defendant company.

Q. Who was the foreman there in charge of that work?

A. Right at that time Mr. John Simmons was looking after the company's interest.

Q. That was the cleaning up of their work there?

A. Yes.

Q. Was any of that work you did near the acid basin or cellar?

A. Right around it and over it, right around the basement.

Q. You may tell the jury now when you was doing that work cleaning up there for the company as you have just stated, if you observed any sulphuric acid in this pit or basin?

A. Well it was dreaning in there more or less all the time from different directions where we were taking up a lot of lead piping.

Q. Lead pipe that had been used in connecting (interruption).

A. Lead pipe connecting—that lead across the railroad track space to the tank building where they loaded in the tanks from the cars.

Q. And were those pipes leading into the basement?

A. They did lead into the basement, they were taken out when I was working there.

Q. You mean to say this acid dreaned out of these pipes as being removed?

A. They had been removed when I was cleaning up or doing the last work there.

Q. Now they manufactured sulphuric acid there, did they?

A. That was what they claimed to do.

Q. Did you see it?

A. Yes I seen it but I ain't much acquainted with that kind of business.

75 Q. Was there any of the sulphuric acid dreaned out of these pipes into the pit, and was it there when you quit cleaning up?

A. Lots of it.

Q. How much was in there?

A. Probably a hundred barrels, or a hundred and fifty, I couldn't tell, I couldn't give much estimate, it was all the time dreaning in while they were cleaning up; I took out the three main towers of the tower building, wrecked them myself, managed it.

Q. Mr. Simmons was there all the time off and on?

A. Yes all the time.

Cross-examination.

Questions by Mr. McClain:

Q. When was this Mr. Stockton?

A. Well, it was along in the fall, latter part of September and October, along in there some time.

Q. In 1910?

A. Yes.

Q. And what were you doing?

A. I was helping to wreck the plant.

Q. What plant?

A. The acid plant they called it.

Q. When you say wreck the plant, you mean to take the building down?

A. Taking the building down, I helped clear through the whole job.

Q. Do you know who bought the building?

A. The acid building, yes sir.

Q. Who?

A. A man from Chanute.

Q. Was it William Lanyon?

A. My understanding was it was a man by the name of Morris.

Q. Somebody bought the building from the company and were wrecking it?

A. Yes. I also worked for him helping to take this.

Q. What I am getting at Mr. Stockton is, you were first there working for the company taking up pipes?

A. Yes sir.

Q. And those were all lead pipes, were they not?

A. Yes.

Q. And when you disconnected them there would be some acid run out?

A. Yes.

Q. But there was not very much at the time in dreading out the pipes?

A. In taking out the pipes there was considerable dreading out in the tank building across the spur there, right west of the— (interruption)

Q. I am speaking of the pipes around that particular basement; not much dreading out at that particular time?

A. Not out of the pipes.

Q. Wait until I get through with my question? How long did it take you to get those pipes up?

A. I didn't take the pipes up.

Q. You disconnected them?

A. No I didn't take the pipes up, I said it was where the pipes had been taken up, I took the towers down.

Q. You weren't there then?

A. Yes I was working there all the time.

Q. But you didn't help take the pipes up?

A. No I didn't take the pipes up.

Q. But all you know is what you saw?

A. Just what I seen working around there and I seen it running out.

Q. And from what they stated, it was sulphuric acid?

A. Yes, that is what they claimed.

Q. You don't know what it was, that is what they told you?

A. I couldn't swear I know what it was because I wasn't acquainted with the stuff.

Q. So your knowledge of this large amount of sulphuric acid you speak of going into this particular basement applies to when you were taking the towers down?

A. Yes, I suppose it applies to that.

Q. I say, it was the time you were taking the towers down?

A. Yes.

Q. You were taking the towers down for the man who bought the building?

A. Yes.

Q. And he was from Chanute?

A. He was from Chanute, that was my understanding.

Q. And he bought the building and was wrecking it?

A. Yes.

Q. And that was when this happened?

A. Yes.

That is all.

Redirect examination.

Questions by Mr. Oyler:

Q. But this last work you did cleaning up for the company M. Simmons was there for the company?

A. Yes, he was working in the interests of the company.

Q. In charge and control of its business?

A. Yes.

Q. Could he see and observe this acid and stuff in the cellar there?

A. Sure could, nothing to hinder any way from seeing it.

Q. Mr. Stockton, how far do you live from this pool of water?

A. About eighty rods I think.

Q. Which way?

A. Northwest.

Q. Have you frequently passed this pool of water and seen it since the buildings were removed?

A. Oh yes very often.

Q. Tell the jury, describe it, at the different times you passed and saw it?

A. I couldn't have much idea of the different times.

Q. Describe its appearance to the jury, whether the water was clear or not?

A. I passed it there when it would be full up to the top of the wall and be clear, and then I have passed it when it was not more than half full, different times; I live close by and frequently down past there.

77 Q. You may state now if you lived there at the time of the different high floods that we have had in the last three or four years?

A. Yes, I have lived there all the time.

Q. Did the water ever get up to that plant?

A. Not to my knowing.

Q. Did it ever get higher than the Prime Western Smelter Company quite a little distance east of that?

A. Not of my knowing.

Recross-examination.

Questions by Mr. McClain:

Q. The flood did get up over the Missouri Pacific tracks to Clayborne's mill in September?

A. It got up to the track on the south side.

Q. Up over it so you couldn't go across to work at the Prime Western, wasn't it?

A. That was way down to the Prime Western.

Q. At Clayborne's mill?

A. I don't think it reached Clayborne's mill. I walked pretty near down to the Prime Western myself when the water was the highest I know of.

Q. In 1915?

A. Yes.

Q. I want to refer once more to the work you speak of; the work you did there was dismantling these towers?

A. Yes.

Q. That is the only work you did there?

A. I worked all over the plant.

Q. Well, at that time though?

A. Yes.

Q. Dismantling this tower building?

A. Yes.

Q. And that you say was under Simmons?

A. The company work was under John Simmons.

Q. But the dismantling of the tower building was not under Simmons, was it?

A. Well, the tank building, the tank building, what I done under the tower building was taking out the brick towers, three towers that was in there, and then this Chanute man, I understand he purchased the tank building, that run north, the long building, and I helped to wreck that all up.

Q. That is the chambers building?

A. Yes.

Q. The work you did at the tower building and chamber building was for the man who bought the building and took it away?

A. Yes he sold it out there a good portion.

Q. He bought the building and took it away?

A. Yes.

Q. And doing that work you didn't work for Simmons?

A. No sir.

Q. But what work you did around in the yard there you did for Simmons?

A. Yes.

Redirect examination.

Questions by Mr. Oyler:

Q. But the last work you did there in shooting these castings out, as you stated, and cleaning up, who did you do that work for?

78 A. That was done for Simmons, the last work I done was taking the castings out of the cement piles.

Q. Was that after the towers had been taken down?

A. Yes sir.

Q. That was the last work you done?

A. That was the last work I done.

And whereas, at the December term, in the year of our Lord one thousand nine hundred and eighteen, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the motion of counsel for plaintiff in error for a continuance over the present term and on the motion of counsel for defendants in error to dismiss, Mr. F. J. Oyler, appearing in support of the motion to dismiss.

On consideration whereof, it is now here ordered by this Court that the motion for a continuance be, and the same is hereby, denied, and the motion of defendants in error to dismiss granted.

It is, therefore, ordered and adjudged by this Court that the writ of error in this cause be, and the same is hereby, dismissed with costs without the filing of an opinion, and that Van Britt and Susie Britt have and recover against The United Zinc and Chemical Company the sum of twenty dollars for their costs herein and have execution therefor.

January 29, 1919.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the first day of April, in the year of our Lord one thousand nine hundred and nineteen.

E. E. KOCH.

*Clerk of the United States Circuit
Court of Appeals, Eighth Circuit.*

Costs of defendants in error:

Clerk paid by plff. in error.	
Printing record, printed below, attorney	\$20.
	\$20.

Endorsed: Filed in the District Court on April 3, 1919.

(Order, June 4, 1919, to Enter the Mandate of the United States Circuit Court of Appeals, of Record.)

In the District Court of the United States, District of Kansas, Third Division.

No. 289.

Civil.

VAN BRITT and SUSIE BRITT, Plaintiffs,

vs.

THE UNITED ZINC AND CHEMICAL COMPANY, Defendant.

Now on this 4th day of June, A. D., 1919, upon application of plaintiffs so to do, it is by the Court ordered that the Mandate of the United States Court of Appeals, Eighth Circuit, heretofore issued in the above entitled cause, be by the Clerk of this Court entered of record.

JOHN C. POLLOCK,

Judge.

Endorsed: Filed in the District Court on June 4, 1919.

(Application for Order Nunc pro Tunc to Correct Judgment of May 10, 1918.)

The plaintiffs move the court for an order nunc pro tunc, directing the clerk of this court to correct the record of judgment entered in this case May 10th, 1918, so that the same will appear in substantially the following form:

6 "Now on this tenth day of May, 1918, this cause came on for further hearing upon the verdict of the jury herein, whereupon said verdict is by the court approved, and it is therefore considered and adjudged that the plaintiffs have and recover of and from the defendant, The United Zinc and Chemical Company, judgment in the sum of five thousand dollars, together with the costs of this action, taxed at \$— and the accruing costs, for all of which let execution issue. And to the aforesaid verdict of the jury and order and judgment of the court, the defendant duly excepted and excepts."

For that notwithstanding said verdict was approved and judgment rendered as aforesaid, the said clerk, thru inadvertence or mistake, failed to enter the same fully of record showing that plaintiffs did have and recover of and from said defendant upon May 10th, 1918, judgment in the sum of five thousand dollars.

F. J. OYLER,

FRED ROBERTSON,

Attorneys for Plaintiffs.

Filed in the District Court April 26, 1919.

(Notice of Application for Order Nunc pro Tunc to Correct Judgment of May 10, 1918.)

To Henry D. Ashley and William S. Gilbert, known as Ashley and Gilbert, attorneys of record for the above named defendant, The United Zinc and Chemical Company:

You are hereby notified that at ten o'clock A. M. of May 5th, 1919 or as soon thereafter as the same can be heard, the plaintiffs above named, Van Britt and Susie Britt, will, in the above entitled case, present to the United States Court for the District of Kansas Third Division, sitting at its court room in Fort Scott, Kansas the application for a nunc pro tunc entry, copy of which is hereto attached, marked "Exhibit A."

Given under our hands this twenty-fifth day of April, 1919.

F. J. OYLER,

FRED ROBERTSON,

Attorneys for Plaintiffs.

Service of the foregoing notice and motion therein referred to is hereby acknowledged this 25 day of April, 1919.

ASHLEY & GILBERT,

Attorneys for Defendant.

The United Zinc and Chemical Company.

Filed in the District Court April 28, 1919

(EXHIBIT A.)

(Application for Order Nunc pro Tunc to Correct Judgment of May 10, 1918.)

The plaintiffs move the court for an order nunc pro tunc, directing the clerk of this court to correct the record of judgment entered in this case May 10th, 1918, so that the same will appear in substantially the following form:

"Now on this tenth day of May, 1918, this cause came on for further hearing upon the verdict of the jury herein, whereupon said verdict is by the court approved, and it is therefore considered and adjudged that the plaintiffs have and recover of and from the defendant, The United Zinc and Chemical Company, judgment in the sum of five thousand dollars, together with the costs of this action, taxed at \$—, and the accruing costs, for all of which let execution issue. And to the aforesaid verdict of the jury and order and judgment of the court, the defendant duly excepted and excepts."

For that notwithstanding said verdict was approved and judgment rendered as aforesaid, the said clerk, thru inadvertence or mis-

take, failed to enter the same fully of record showing that plaintiffs did have and recover of and from said defendant upon May 10th, 1918, judgment in the sum of five thousand dollars.

F. J. OYLER,
FRED ROBERTSON,
Attorneys for Plaintiffs.

(*Order, May 5, 1919, Sustaining Plaintiff's Application for Order Nunc pro Tunc to Correct Judgment of May 10, 1918, and Judgment of May 10, 1918, Corrected, etc.*)

Now, to-wit, on this fifth day of May, 1919, this cause comes regularly on for hearing in open court upon the application of the plaintiffs for entry nunc pro tunc, which application was filed in this cause. April 26th, 1919, the plaintiffs being present by their attorneys, F. J. Oyler and Fred Robertson, and the defendant being present by its attorneys, Messrs. Henry D. Ashley and William S. Gilbert. Thereupon testimony is offered and received in behalf of both plaintiffs and defendant, and said motion is duly argued to the court by counsel for the respective parties.

The court upon due consideration, and being well advised in the premises, finds that the said application should be sustained. It is therefore by the court considered, ordered and adjudged that the record of the judgment in this case rendered upon May 10th, 1918, be by the Clerk of this Court corrected and the omission therefrom by him be supplied so that the same will read as follows:

"Now on this tenth day of May, 1918, this cause came on for further hearing upon the verdict of the jury herein, whereupon said verdict is by the court approved, and it is therefore considered and adjudged that the plaintiffs have and recover of and from the defendant, The United Zinc and Chemical Company, judgment in the sum of five thousand dollars, together with the costs of this action, taxed at \$—, and the accruing costs, for all of which let execution issue. And to the aforesaid verdict of the jury and order and judgment of the court, the defendant duly excepted and excepts."

And immediately thereupon counsel for defendant file- its petition for writ of error and assignments of error accompanying the same, which writ, upon due consideration, is by the court ordered shall be issued and allowed, and citation is thereupon issued, returnable to the United States Circuit Court of Appeals, Eighth Circuit, and service of the same accepted by counsel for plaintiff-.

It is further ordered that a full and complete transcript of all the evidence heretofore offered in this case, as set forth in the printed transcript of the record in this case on a former writ of error, being case No. 5239 heretofore pending in the United States Circuit Court of Appeals, and filed in that court August 22nd, 1918, together

with the transcript of the proceedings which this day to
 9 place, as transcribed by Miss Elizabeth La Bar, be and
 same is hereby signed, settled and allowed as the true
 of exceptions and made part of the record in this case.

JOHN C. POLLOCK,

Judge

O. K. as to form.

ASHLEY & GILBERT.

F. J. OYLER &

FRED ROBERTSON.

Filed in the District Court May 5, 1919.

BILL OF EXCEPTIONS.

*Transcript of Proceedings on Application of Plaintiffs for En
 Nunc pro Tunc, Fort Scott, Kansas, May 5, 1919.*

Appearances:

For the Plaintiffs: Messrs. F. J. Oyler and Fred Robertson.

For the Defendant: Messrs. Ashley & Gilbert.

Mr. Ashley: It is understood, or, at least Mr. Robertson told
 that on account of the fact this record comes from Fort Scott
 is stipulated that this printed transcript is a correct certification
 the clerk, that he made the transcript that went to the Court of
 peals, and that it is a correct transcript of the record.

Mr. Robertson: I have here certified copies of the journal ent
 and they appear to be the same as the transcript.

Mr. Ashley: This was done entirely at Mr. Robertson's sug
 tion to me. We were served with a notice to appear at Fort S
 on next Monday to take up the nunc pro tunc entry; and when
 thing occurred, the state of the record was as great a surprise to
 when we took the case to the Court of Appeals, as to you; and
 next day we sent our young man from our office down there to
 if the record could be as it is, and he found it exactly as it is; an
 do not care whether you read from this or that, provided it is
 same.

Mr. Robertson: It is the same.

Mr. Ashley: What you are going to read is in this transe
 is that right?

10 Mr. Robertson: Yes sir. There is another understand

your Honor; we do not want to take any advantage of
 gentlemen, and, of course, we do not want them to take any
 vantage of us; but we had an understanding this record would
 as though we were at Fort Scott on the 5th day of May, the
 day of the May term. So, that, if you ever have to make a re
 have it appear as though we were all at Fort Scott.

Now as your Honor no doubt remembers, in this Britt case,
 case where the two boys were involved, and wherein the father
 mother brought suit to recover damages for their death, allege

have taken place in a pool of water near Iola; in that case, as you no doubt further remember, on the tenth day of May, 1918, a verdict was returned by the jury which tried the case assessing the damages of the plaintiffs at five thousand dollars. And on the same day the clerk in making entry of the matter omitted to record your Honor's judgment which follows that verdict. That is, that portion of the judgment which provided plaintiffs should recover from defendant the sum of five thousand dollars.

Mr. Ashley: Pardon me, Mr. Robertson, but it is our contention, from the record, his Honor Judge Pollock did not render any judgment; the record does not disclose it.

Mr. Robertson: I am stating what the evidence will show. Now, having discovered this omission in the record by the clerk, motion was filed in this court on the 26th day of April, 1919, praying that your Honor at this time would direct the clerk to supply his omission in this record. The application is short and I will read it. (Reading, as follows:)

"The plaintiffs move the Court for an order nunc pro tunc, directing the clerk of this court to correct the record of judgment entered in this case May 10, 1918, so that the same will appear in substantially the following form:

"Now on this tenth day of May, 1918, this cause came on for further hearing upon the verdict of the jury herein, whereupon said verdict is by the court approved, and it is therefore considered and adjudged that the plaintiffs have and recover of and from the defendant, The United Zinc and Chemical Company, judgment in the sum of five thousand dollars, together with the costs of this action, taxed at \$—, and the accruing costs, for all of which let execution issue. And to the aforesaid verdict of the jury and order and judgment of the court, the defendant duly excepted and excepts."

11 For that notwithstanding said verdict was approved and judgment rendered as aforesaid, the said clerk, thru inadvertence or mistake, failed to enter the same fully of record showing that plaintiffs did have and recover of and from said defendant upon said May 10th, 1918, judgment in the sum of five thousand dollars."

Mr. Robertson: If your Honor please, I desire to offer in evidence three papers, which have been marked Exhibits one, two and three; those are certified copies of the records, journal records.

Mr. Ashley: It is all in this transcript of the record; why do you need to offer that; I do not understand. I have not seen them. It was our understanding we were to try this motion for nunc pro tunc entry on the record as the clerk certified it to the Court of Appeal. If there is no distinction and no difference, why offer it?

Mr. Robertson: The idea of this offer is, that we want to offer the journals, as they now stand, in the condition they now are, so that the court may see what was recorded.

Mr. Ashley: Well, this transcript which has been solemnly certified to by the clerk is the record; that was my stipulation with you.

Mr. Robertson: I think it is exactly, word for word, with these exhibits.

The Court: Why not offer the three papers, the same being as shown in the transcript of the printed record; then you have it right in the printed record to start with.

Mr. Ashley: Well, there is this difference between these documents you are offering, a very essential difference, that the record as certified solemnly by the clerk shows the signature of John C. Pollock to all of these entries. These papers that you now have here have not the Judge's signatures, whereas, the original transcript of the records as solemnly certified to by the clerk have the signatures of John C. Pollock; and we do not think you are following our stipulation.

Mr. Robertson: The only understanding we had Mr. Ashley, was, that the body of the judgment was the same on the journal as it is in your transcript.

12 Mr. Ashley: I cannot quite say that.

The Court: Have you a written stipulation?

Counsel: No, Your Honor.

Mr. Ashley: This transcript, Your Honor, was solemnly certified by the clerk, even went to the United States Circuit Court of Appeals, and we have sent down there and compared it, and I cannot see how this motion can be presented on anything else under our understanding.

The Court: I do not know what your understandings are. They can present these, and then you can present the record. In that way we will have it all. If you had a written stipulation here I could tell what your understandings are.

Mr. Ashley: Yes, of course this was done very hurriedly. But our contention will be, your Honor, on an application for a nunc pro tunc entry, after the clerk has solemnly certified his record up to the Court, the question of granting or refusing of this nunc pro tunc order would depend upon the solemnly certified record as it went up.

Mr. Robertson: Now, I think, this all of the evidence we care to offer. These exhibits have in them the verdict of the jury. Does your Honor care to have them read?

The Court: No. I suppose the verdict of the jury is in this record too.

Mr. Ashley: Yes.

Exhibits Nos. 1, 2 and 3, above referred to, offered and received in evidence, are as follows:

(EXHIBIT 1.)

Certified Copy of Entry May 9, 1918, in the case of Van Britt et al. vs. United Zinc and Chemical Company in the U. S. District Court for the District of Kansas.)

In the District Court of the United States for the District of Kansas,
Third Division.

No. 289.

VAN BRITT and SUSIE BRITT, Plaintiffs,

vs.

THE UNITED ZINC & CHEMICAL COMPANY, Defendant.

Now on this 9th day of May, 1918, one of the regular days of May, 1918, Term, this cause came on regularly for trial, the plaintiffs appearing in person and by their attorneys, F. J. Oyler, and Fred Robertson, and the defendant appearing by its attorneys, Ashley and Gilbert, and Baxter D. McClain; and come also to try said cause twelve good and lawful men from the body of said district, to-wit: J. D. Arnett, John Myers, Paul Mattox, C. O. Bollinger, E. Harris, Ray Paulen, F. B. Miller, W. K. Craig, Earl Payne, C. J. Hayes, T. J. Cummings, Jr., H. P. Wiltse, and who were thereupon duly impaneled and sworn to well and truly try said cause according to the law and the evidence.

And now the hour for adjournment having arrived and the jury having been duly admonished as to their duties in the premises, the court arose and the further hearing of this cause is adjourned until tomorrow morning, at 9:30 A. M.

Judge.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, F. L. Campbell, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the within and foregoing to be a true, full and correct copy of the Journal Entry filed May 9, 1918, and entered on page 29, Journal E, in the case of Van Britt and Susie Britt vs. The United Zinc & Chemical Company, No. 289.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Fort Scott, in said District of Kansas, this 2nd, day of May, 1919.

[SEAL.]

F. L. CAMPBELL,

Clerk.

C. N. PRICE,

Deputy Clerk.

(EXHIBIT 2.)

(Certified Copy of Entry of Trial and Verdict May 10, 1918, in the Case of Van Britt et al. vs. United Zinc and Chemical Company in the United States District Court for the District of Kansas.)

In the District Court of the United States for the District of Kansas,
Third Division.

No. 289.

VAN BRITT and SUSIE BRITT, Plaintiffs,

vs.

THE UNITED ZINC & CHEMICAL COMPANY, Defendant.

And now on this 10th day of May, 1918, at the hour to which this cause was adjourned, the parties and the jury appear as
14 on yesterday and the further hearing of this cause is resumed.

At the conclusion of plaintiffs' case comes the defendant and moves the Court for a directed verdict in favor of defendant in the nature of a demurrer, said demurrer being overruled by the court.

The Parties introduce their evidence.

And now the parties having presented their arguments to the jury and the Court having fully charged the jury as to the law applicable, the jury retire in charge of their sworn Bailiff to consider as to their verdict.

And now this 10th day of May, 1918, the jury bring into the court their verdict which is in words and figures as follows:

Caption Omitted.

We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, and assess his damages at \$5,000.00.

C. O. BOLLINGER,

Foreman.

And said verdict is received and read in open court by the Clerk and is by the court ordered recorded in the records of the Clerk.

Thereupon, it is ordered by the Court that the jury be and they are hereby discharged from further consideration of this case.

Judge.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, F. L. Campbell, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the within and foregoing to be a true, full and correct copy of the Journal Entry filed May 10, 1918, and entered on page 32, Journal E. In the case of Van Britt and Susie Britt vs. The United Zinc & Chemical Company, No. 289.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Fort Scott, in said District of Kansas, this 2nd day of May, 1919.

[SEAL.]

F. L. CAMPBELL,
Clerk.

C. N. PRICE,
Deputy Clerk.

15

(EXHIBIT 3.)

(Certified Copy of Judgment May 10, 1918, in the Case of Van Britt et al. vs. United Zinc and Chemical Company in the United States District Court for the District of Kansas.)

In the District Court of the United States for the District of Kansas,
Third Division.

No. 289.

VAN BRITT and SUSIE BRITT, Plaintiffs,

vs.

THE UNITED ZINC & CHEMICAL COMPANY, Defendant.

Now, on this 10th day of May, 1918, this cause came on for further hearing and it is by the Court ordered and adjudged that the said defendant, The United Zinc & Chemical Company, pay the costs of this action taxed in the sum of \$—, and accruing costs, and go hence without day.

And to the aforesaid verdict of the jury and order and judgment of the Court the said defendant duly excepted and still except-

Judge.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, F. L. Campbell, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the within, and foregoing to be a true, full and correct copy of the Journal Entry

filed May 10, 1918, and entered on Page 33, Journal E. In the case of Van Britt and Susie Britt vs. The United Zinc & Chemical Company, No. 289.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Fort Scott, in said District, of Kansas, this 2nd day of May, 1919.

[SEAL.]

F. L. CAMPBELL,
Clerk.

C. N. PRICE,
Deputy Clerk.

(Statement and Argument by Counsel for Defendant in Opposition to Plaintiffs' Application for an Order Nunc pro Tunc to Correct Judgment of May 10, 1918.)

Mr. Ashley: Well, now, if your Honor please, as the distinguished gentlemen you have just referred to once said to me in his
16 court, "Mr. Ashley, you are very eloquent on the nunc but will you kindly address yourself to the tunc."

The office of a nunc pro tunc entry is to make a record of what was previously done, but not then entered; not to make an order now for then, but to enter now for then: an order previously made.

Now, as I said once before, it seems to me a most remarkable thing that my partner, Mr. Gilbert, who went down to the Court of Appeals to argue this case, and myself, assumed that there had followed this verdict a judgment, and when he got up to argue the very interesting propositions of law which this case presented on your Honor's view of the law, which differed from ours,—I guess it was Judge Sanborn who looked at his record and said to Mr. Gilbert, "Where is your judgment?"

Mr. Gilbert: It was Judge Carland.

Mr. Ashley: It was Judge Carland, I was not there.

Now the record shows, "We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, and assess his damages at five thousand dollars." Your Honor will remember, in fact, the record discloses, that there was a five o'clock train leaving Ft. Scott, and the fact at the end of your Honor's charge you said to them, Gentlemen of the jury, there is a train leaving very soon." I can read that if necessary. Perhaps your Honor remembers it.

The Court: No, I do not.

Mr. Ashley: I will find it.

Mr. Oyler: I think the train left at six forty.

Mr. Ashley: Perhaps. Whatever the time was. (Reading.)

"Gentlemen, this is the last matter we have; you may retire to your jury room and consider your verdict. And while there are two counts, you may return your verdict, in the event you find for the

plaintiff, you may consolidate and put all in one amount. Or, if your judgment is in favor of the defendant, there is a general verdict here for the defendant.

It is now five o'clock. I want you gentlemen to consider the matter carefully. In the event you should arrive at a verdict in an

hour or so, I believe there is a train leaves here at six forty. If
17 you gentlemen have duly considered the matter and returned your verdict before that time, some of us, at least, will be enabled to get away. You may retire."

Now the record discloses this over the signature of your Honor.

"And said verdict is received and read in open court by the clerk and is by the court ordered recorded in the records of the Clerk. Thereupon, it is ordered by the Court that the jury be and they are hereby discharged from further consideration of this case.

JOHN C. POLLOCK,
Judge."

"Filed in District Court May 10, 1918."

And now comes this remarkable entry, and I am sure I have no idea how it came:

"Now, on this tenth day of May, 1918, this cause came on for further hearing and it is by the Court ordered and adjudged that the said defendant, The United Zinc & Chemical Company, pay the costs of this action taxed in the sum of \$... and accruing costs, and go hence without day.

"And to the aforesaid verdict of the jury and order and judgment of the Court the said defendant duly excepted and still except.

JOHN C. POLLOCK,
Judge.

Filed in District Court May 10, 1918."

Of course it would perhaps be within the power of your Honor as a Judge to have made that Judgment; it would have amounted to the setting aside of the verdict, unquestionably; but it perhaps would have been within your Honor's power (but I do not contend you had any feeling of dissatisfaction with the verdict of the jury) to have rendered such a judgment.

Now, after the May Term elapsed, after the November Term came and elapsed, and on the first day of the May Term, 1919, there is presented an application for an order setting aside the judgment shown in the record and rendering a judgment finding in favor of the plaintiff and against the defendant, not for costs and the defendant go hence without day, but for five thousand dollars and costs.

Now where is the tunc. It is not any where unless it is in
18 the verdict. In fact, it is worse than nowhere because the record discloses a judgment which is a final judgment in favor of the defendant, "Let defendant go hence without day." The only ingredience in it which lack finality is that the amount of the costs are put in, and it says "costs to accrue."

Now the question of the power of the court to do it is certainly a very close one.

"Such a decree (*nunc pro tunc*) presupposes a decree allowed or ordered but not entered through inadvertence of the Clerk; or a decree in a cause which is under advisement when the death of a party occurs."

And in the case of *Wetmore vs. Karrick*, 205 U. S. 141, which is a very interesting case, the Court says:

"A court has power to order entries of proceedings, had by the court at a previous term, to be made *nunc pro tunc*; but where the court has omitted to make an order which it might or ought to have made, it cannot, at a subsequent term, be made *nunc pro tunc*."

It is equally well established that after the term has ended, all final judgments pass beyond the court's control and errors made can be corrected only by writ of error or appeal.

To this latter rule there has always existed an exception founded upon the common law writ of error *coram nobis* which brought before the same court where the error was committed certain mistakes of fact not put in issue or passed upon by the court, such as, death of one of the parties, coverture, error in process, and mistakes of the clerk.

"The question relates to the power of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate and modify its final judgments after the term at which they were rendered, and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state, or the practice of the courts."

Bronson vs. Schulten, 104 U. S. 410.

In *Wetmore vs. Karrick* Mr. Justice Day cites with approval a quotation from *Hyde vs. Curling*, 10 Mo. 359, cited in *Wight vs. Nicholson*, 134 U. S. 136, 33 L. Ed. 865, which is as follows:

"A court has power to order entries of proceedings had by the court at a previous term to be made *nunc pro tunc*; but
19 where the court has omitted to make an order which it might or ought to have made, it cannot at a subsequent term be made *nunc pro tunc*."

Definition of a clerical error:

"A clerical error, is an error of a clerk or a subordinate officer in transcribing or entering an official proceeding ordered by another."

"On this question as to whether this judgment which appears in the record to have been entered by your Honor, assessing the costs

against this defendant, that the defendant go hence without day, Black says:

"A judgment which merely awards costs to the defendant without more is not a final judgment. In order to have that character it must confess to terminate and completely dispose of the action. Hence if for defendant the final judgment must state that he is dismissed without day, or that it is considered that the plaintiff take nothing by his suit or otherwise refer to the disposition made of the subject matter of the suit."

Now it seems to me that the record showing your Honor having entered this judgment, dismissing the defendant without day and taxing the costs against it, that it is even in a worse shape for the plaintiff than as though there were no tunc, no record. It would appear, for the reason that we were all hastening to get away, that the plaintiff's attorney, who was the party most vitally interested, failed to, as, of course, we know in the Federal Courts the court relies very largely on counsel in procuring their orders that they may want—failed to procure any order from your Honor as to the judgment on the verdict, and the clerk in solemnly certifying the record finds that your Honor made a judgment in favor of the defendant go hence without day, and taxing the costs against the defendant. Now, after two terms have elapsed, we respectfully submit that this nunc pro tunc entry is beyond the power of the court. I have some citation of cases here. And it is a very remarkable state of the record, and if anybody suffers of course it is the plaintiff, and if it was anybody's neglect, it was the neglect of counsel for the plaintiff in not having, after they had been
20 fortunate enough to get a verdict from the jury, in a very short time, not having seen to it that a judgment followed that verdict.

Mr. Gilbert, do you want to add anything?

Mr. Gilbert: No, I think not.

(Argument of Counsel for Plaintiffs in Support of Application for Order Nunc pro Tunc to Correct Judgment of May 10, 1918.)

Mr. Robertson: I think, your Honor, Judge Ashley must be used to a different practice; it must be that over in their Federal Court they trust the matter of entries in these law cases to the lawyers; as your Honor well knows, that is not our practice in this District. The Clerk enters the judgment as a matter of course, following the verdict. And while I do not suppose there would be any objection to the lawyers assisting the Clerk in this regard, it is not the practice as I have met it and found it in my experience in the law cases.

Now we do not believe, your Honor, there is a chance of dispute on the question of your Honor's power to make the entry prayed for. I do not know whether your Honor is familiar with the Cyclo-

pedia of United States Supreme Court reports. It is a set of books used by a good many lawyers for investigating and ascertaining what the law is, and getting the authorities, but nevertheless it is a text too, written by very able lawyers, in a number of volumes reviewing the decisions of the Supreme Court of the United States. And in reviewing these decisions, which decisions I have here in my memoranda brief, the writer says:

"It is a well established rule that a court after the expiration of the term, may, by an order *nunc pro tunc*, amend the record by inserting what had been omitted by the act of the clerk or of the court. This power to amend by entry *nunc pro tunc* must not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission of some entry should have been made during the progress of the case, or by the loss of some document originally filed therein.

I think Judge Ashley's argument is quite right, that we have no right to make anything here, to make anything new; that is, that it has a new effect in law, a new force of any sort.

And it seems to me clear we are not undertaking to do that this morning.

"It presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein."

"This power to supply at a subsequent term some omission in the entry of what was done at the preceding term must be exercised by the court, and the clerk has no power to do this of his own motion."

In 134 U. S. 143-144, Wight, Petitioner, we have this decision on this subject:

"Neither, it has been held, can the clerk, at a subsequent term, make an entry of what truly transpired at the preceding term. But this refers to the power of the clerk proceeding of his own motion. The court may order *nunc pro tunc* entries, as they are called, made to supply some omission in the entry of what was done at the preceding term; yet, this is a power the extent of which is limited and not easily defined. In general, more clerical errors may be amended in this way. So, if the mistake of the clerk in the name of the judge before whom the indictment was found. The present case comes within the clause of the section which declares the power of the court to make *nunc pro tunc* entries to supply some omission in the record of what was done at the time of the proceedings.

An extensive list of authorities is cited in the foot note of Mr. Bishop, and among those which support the power of the court to make a record of some matter which was done at a former term of which the clerk had [make] no entry, the following cases directly affirm that proposition. Citing cases, 134 U. S. 143-144."

There was a case went up from this District to the Supreme Court of the United States, before your Honor came on the bench, entitled, Hickman vs. Ft. Scott, in which this very question was [passes] on, with this result:

(Decision by the Supreme Court.)

"The power to amend its record to correct mistakes of the clerk or other officer of the court, inadvertencies of counsel, or to supply defects or omissions in the record, even after the lapse of the term, is inherent in courts of justice, and was recognized by this court in (several cases cited.)"

So it would seem the Supreme Court has thought it wise that this remedy could be used to supply even the omissions of counsel;
 22 of seeing to entries, I assume, that it would be counsel's duty to look after, as suggested by opposite counsel.

Here is a case that is of some interest in a situation like we have here:

"Where the trial court, of its knowledge made a nunc pro tunc order correcting the record of a judgment after the term, the fact that such order was made without notice to the defendant did not render the judgment as corrected subject to collateral attack."

Grotenbridge etc. vs. Clark, 126 Fed. 552.

This was a case where Judge Trieber, if I remember, discovered the omission of some entry the clerk should have made, and it was something the Judge had in his own recollection or at least felt it was something that must have happened, could not have been otherwise, under the circumstances, and he just ordered the clerk to make the entry and did not notify opposing counsel, or notify anybody; and then upon discovery objections were made and the case was taken up and reviewed. The title of the case is Groton Bridge vs. Clark, 126 Fed. 552.

Now it seems to me Your Honor it would be difficult for any one of us who took part in that matter to argue with ourselves even for the purpose of satisfying ourselves that no judgment was entered there. I cannot see how we could well do that. The conduct of counsel after the verdict was approved and entered shows very clearly what they thought of it; opposite counsel accepted the judgment [has] having been entered; appealed from it; gave a supersedeas bond to cover its payment in the sum of six thousand dollars; prepared an extensive record and briefs advancing a great many different reasons why this judgment was erroneously entered, and of course, filed a motion for new trial, asserting many reasons why this verdict and judgment ought to be vacated and a new trial granted. So that, without going into extended detail, reminding your Honor of what the state of the case is, it would seem, I think, very difficult for counsel to contend that your Honor did not actually enter a judgment and the clerk did not omit to record it fully.

(*Argument of Counsel for Defendant in Opposition to Application for Order Nunc pro Tunc to Correct Judgment of May 10, 1918.*)

Mr. Ashley: If the court please, just a single word: I am glad Mr. Robertson has alluded to the bond, because in these
 23 cases one of the things the courts are most tender, is the effect of this thing on the rights of third parties. And I confess right now, it seems incredible stupidity, and I only explain it by reason of the fact that we all assumed that that judgment had followed; that it was never discovered; we were as guileless as anybody until Judge Carland pointed to this record, that there had not been a judgment entered. Now the bond, as appears by the record, is signed by Mr. Goebel, at the request of Mr. Downing, was a supersedeas bond against the judgment, and unless it could be in some way corrected by a nunc pro tunc the bond that Mr. Goebel would be liable—or would be a bond for the costs of the case. Now the financial situation of this defendant has suffered by the effects of this war, as many other people have suffered, and it would be a great wrong and hardship to the surety on that bond if the judgment which appears by the solemn certificate of the clerk to have been entered were by nunc pro tunc changed into the judgment they ask for in their application.

And one other word: I think, as I said at the beginning the trouble with Mr. Robertson's argument is, that it is addressed wholly to the nunc rather than the tunc, for he says, "For that notwithstanding said verdict was approved and judgment rendered as aforesaid," that is, the judgment he now has, which is a judgment against the defendant for five thousand dollars, "The said clerk, thru inadvertence or mistake, failed to enter the same fully of record showing that plaintiffs did have and recover of and from said defendant upon said May tenth, 1918, judgment in the sum of five thousand dollars."

Now what was done was not that at all, but a judgment was entered and appears in the solemn record as certified to by the clerk, was that your Honor entered a judgment that the plaintiff recover of the defendant the costs and go hence without day, the amount of the costs not being filled in, and adding the words, "accruing costs" which I think is the only thing that prevents it from being absolutely final. So, that, as I say, it would not only effect whether your Honor had—addressing myself rather to the essence of the controversy, I have no doubt in the world your Honor charged the jury exactly as your Honor believed the law to be, but it is at least a very debatable question how far the case known as the Stout case in the Supreme Court of the United States, which put into the common law rule that a land owner was only liable to a trespasser for acts of affirmative wrong, such as man-traps, and that sort of thing, and made applicable for the first time in the Stout case to a turn-table, on the

24 theory the turn-table was something attractive, it supplied the place of invitation—I concede your Honor took a different view of the law about that matter, but that being true, even your

Honor can see it presented a very close question: and now that the rights of third parties, the surety on this bond, have intervened, if your Honor has doubts about lacking the power, it seems to me that this motion for a nunc pro tunc entry ought to be overruled in view of the state of the record. What Mr. Robertson has said about our conduct, as I have said once before, was based upon our stupidity, if you please, and we did go to great expense and get up a record, and Mr. Gilbert worked, and never more astonished in his life, having prepared himself to argue the very interesting questions of law presented, than when he discovered there was no judgment here except one against the defendant for costs and that the defendant go hence without day.

(Memorandum Opinion of the District Court on Application for Order Nunc pro Tunc to Correct Judgment of May 10, 1918.)

The Court: As known to all of us, the condition of this record arises out of the unfortunate death of the clerk of this court. Mr. Albaugh, for many years, ever since I have been on the bench, shortly after I went on the bench in 1903, or early in 1904, perhaps, became clerk of this court on the death of the then clerk Mr. Brown. Mr. Albaugh's death occurred in the spring of last year. His assistant, Frank Campbell, became then by change in matters, the clerk of the court, and his deputy at Fort Scott was made his principal deputy and taken from Fort Scott to Topeka, and Clarence N. Price was by him made deputy at Fort Scott, where this matter was tried. He, of course, had never theretofore been a clerk or in the office of the clerk of this court. The position was to him a new one. This is a law action. On the law side of this court,—it is a court of record—the record is kept by the clerk. The court, in practice, never signs the entries made in a law action, the clerk keeping the record and preparing the entries, the record of all the proceedings on the law side of the court. Of course, on the equity side of the court, it not being a court of record, there is no record until it is signed by the chancellor, and the signed orders and decrees of the chancellor make up the record on the equity side of the court.

For more than fifteen years, at least ever since I have been on this bench, and long before that time, and as known to me in actual practice, there has been a standing rule of this court that judgment follows the return of a verdict. The clerk enters the judgment without any direction from the court. That understanding in this court has been in force, to my certain knowledge, for a quarter of a century. If, upon the return of a verdict in any case the court is of the opinion for any reason a judgment should not be entered on the verdict, the court directs that no judgment be entered on the verdict until directed. Of course, no such direction was made in this case, and all assumed, as was the duty of the clerk under the standing order of court put in effect I believe by Mr. Justice Brewer when he was Judge of this court—all assumed the clerk was familiar with the rule and did his duty in that regard. It ap-

pears, he being unfamiliar with the duties of the clerk's office and the standing rule of the court, through inadvertence did not enter a judgment of the verdict. Of course, as I remember it, there was an application here to set aside the verdict and grant a new trial. There was grave difference of opinion as to the law of this case. It was very ably and very earnestly contended by counsel for the defendant in an argument on the motion for a new trial, and during the trial of the case, that the court's view of the law of the case was not the true rule. I, however, did regard the case, under the peculiar circumstances, taking into consideration the heated spell of the weather, the time of year, the appearance of the pool, as shown by the evidence, operated as an invitation. Whether right or wrong, that was the view the court took.

So, under the practice and rules obtaining in actions at law in this District, I am quite confident the failure to record a judgment on this verdict at the time was through the inadvertence and inexperience of the clerk, and that it should have been, and as it was not, it must be now done as it should have been by the clerk at that time. Indeed, I am further convinced, that at any time, under the rules of this court, and the standing orders, the clerk, finding that verdict and no judgment on it, would have been authorized, in fact, it would have been his duty, the verdict not having been set aside,—found there in the record, to have entered judgment; the judgment would have been perfectly good. It should have been done right at once, under the rule, but if he discovered he failed to do his duty in that respect, it would have been his duty to have entered judgment. So, I do not think any one will be wronged by now doing what he should have done at the time. So, I will make that order.

Mr. Ashley: I think, if your Honor please, that the notes taken at Mr. Robertson's request today ought to be added to and entered in the bill of exceptions.

The Court: I will give you an order making them a part of the record in the case.

Order of the District Court as to the Bill of Exceptions; Bill of Exceptions Settled and Allowed, etc.

Now on this 5th day of May, 1919, come the plaintiffs by their attorneys, F. J. Oyler and Fred Robertson, and comes defendant by its attorneys, Henry D. Ashley and William P. Gilbert and it is by the Court ordered that the foregoing transcript of the proceedings and evidence as transcribed by Miss Elizabeth La Bar, and set forth in the foregoing 24 pages, together with the printed transcript of the record in this case on a former writ of error, being case number 5239 heretofore pending in the United States Circuit Court of Appeals, for the Eighth Circuit, and filed in that Court on or about August 22, 1918, be and the same are hereby signed, settled and al-

lowed as the true bill of exceptions and record and are hereby made a part of the record in this case.

JOHN C. POLLOCK,

Judge.

Filed in the District Court May 5, 1919.

Stipulation as to Transcript of Record and Briefs.

It is hereby stipulated by the parties that on the hearing of the writ of error in the United States Circuit Court of Appeals for the Eighth Circuit, now being prosecuted by defendant, printed copies of the record in this case on the first writ of error in said United States Circuit Court of Appeals, being No. 5239 and styled United Zinc & Chemical Company, Plaintiff in Error, vs. Van Britt and Susie Britt, Defendants in Error, may be used in their present shape as a part of the record on the writ of error now being prosecuted by defendant; and that as a return to the said second writ of error now being prosecuted by said defendant only the additional record made since the determination of said first writ of error by the United States Circuit Court of Appeals be certified up by the Clerk of the United States District Court and printed and used with the printed record in the former writ of error by the United Zinc & Chemical Company on the hearing of the writ of error now being prosecuted by this defendant.

It is also stipulated that briefs filed in said United States Circuit Court of Appeals for the Eighth Circuit by attorneys for both plaintiff in error and defendants in error may be used in their present shape on the writ of error now being prosecuted by defendant and that attorneys for plaintiff in error and defendants in error may file additional briefs in the manner and time as provided by the rules of court.

This stipulation is made for the purpose of saving expense in the printing of the record and briefs and with the understanding that the plaintiffs below shall not thereby waive any right to contend that defendant is not entitled to prosecute a second writ of error.

Dated Fort Scott, Kansas, May 5, 1919.

HENRY D. ASHLEY &
WILLIAM S. GILBERT,

Attorneys for Defendant.

F. J. OYLER AND
FRED ROBERTSON,

Attorneys for Plaintiffs.

Endorsed: Filed in the District Court on May 5, 1919.

Assignment of Errors.

Now comes the defendant in the above cause on this 5th day of May, 1919, and files the following assignment of errors upon which it will rely, upon the prosecution of the writ of error in the above entitled cause from the judgment rendered by this Honorable Court.

I.

Because the United States District Court for the District of Kansas, Third Division, erred in overruling the demurrer interposed by the defendant (now plaintiff in error) to the petition filed in the cause.

II.

Because the court erred, as shown by the record in this case, in the following particular, namely; the court having found on the
28 trial of the only issue of fact involved in the motion to remand theretofore filed by the plaintiffs in this case; (such motion to remand having been made by plaintiffs below solely on the ground that the plaintiffs were both at the time of filing their petition residents of the State of Missouri); on passing on demurrer to petition that such plaintiffs' children were at the time of their death citizens of the state of their parents' residence nevertheless permitted plaintiffs below to go to the jury, without any allegation in their petition that no administrator had been appointed for either of the minor children of plaintiffs, for whose death this suit for damages was brought, notwithstanding the provisions of Sections 7323 and 7324 General Statutes of Kansas, and notwithstanding especially the following provisions of Section 7324:

"That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section is or has been at the time of his death in any other state or territory, or when, being a resident of this state no personal representative is or has been appointed, the action provided in said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

III.

Because the court erred in allowing plaintiffs to introduce any evidence under the petition over the objection of defendant made at the beginning of the trial.

IV.

Because the Court erred in not peremptorily instructing the jury to find for defendant at the close of all the testimony.

V.

Because the Court erred in instructing the jury as follows:

"Gentlemen, this is the last matter we have; you may retire to your jury room and consider your verdict, and while there are two counts, you may return your verdict—in the event you find for the plaintiffs—you may consolidate and put all into one amount. Or, if your judgment is in favor of the defendant, there is a general verdict here for defendant."

VI.

Because the Court erred in refusing to embody in his oral charge the following as requested by defendant, viz., "The

29 Court charges the jury on the second count of the petition praying for damages on account of the death of the elder boy, Allen, about ten years of age, who lives some hours after getting out of the water, that if they believe from the evidence that said Allen Britt died from the effects of his going voluntarily into the water standing in the basement of the building on the land of defendant formerly known as the tower building in an effort to rescue his younger brother Edward, they will find for the defendant on the second count of their petition."

VII.

Because the Court erred in charging the jury as follows:

"Gentlemen of the jury, I believe the law to be this:

That the law excuses a child of immature years from the same obligation in regard to trespassing on others' property that it does an adult. The adult knows more about property lines, property rights, than does the immature child. And if these children, being camped there with their parents were attracted onto these premises, although they may not have seen this pool when they were off the premises, yet, if anything, curiosity, or otherwise, brought them upon the premises of the defendant, and then they saw this pool, and on account of the weather, its apparent healthfulness and condition was attractive to these children to go in bathing, and they were thus allured to enter the pond, but still, if the pond was of the character charged here by the plaintiffs in this case, and they thus lost their lives, the defendant would be liable if it knew this pool was standing there thus poisoned, or, if by the exercise of reasonable caution and prudence in the maintenance of its property it should have so known; that is to say, if it knew it left there these poisonous substances, which mixed with this water would become impregnated in this pond, still, in such event, although the children may not have seen this pond from the highway, the defendant would be liable if the pond was left by defendant wholly unguarded."

VIII.

Because the Court erred in not embodying in his oral charge to the jury as requested by defendant the following:

"The Court charges the jury that they must find for the defendant if they believe from the evidence that neither of the sons of plaintiffs saw the water standing in the basement of the old tower building until they had gotten upon the private property belonging to the defendant; provided said boys came upon such property without the knowledge [of] invitation of defendant, or of any of its officers, agents or employees."

IX.

Because the Court erred in not embodying in his oral charge to the jury as requested by defendant the following:

"The Court charges the jury that unless they find from the evidence that the place in which plaintiff's children lost their lives was an attractive place for children of immature years to gather, congregate, enter, bathe, and play, they will find for the defendant, even though they find that the land where their death occurred belonged to defendant."

X.

Because the Court erred in not embodying in his oral charge to the jury as requested by defendant the following:

"The court charges the jury that even if they believe from the evidence the water of a noxious or poisonous character was standing in the basement of the old dismantled building of the land of defendant July 28, 1916, was the cause of the death of either or both of plaintiff's children, they still must find for the defendant unless they further believe from the evidence that defendant knew of the noxious or poisonous character of the water in said basement [of] should have known of it by the exercise of ordinary care."

XI.

Because the Court erred in not embodying in his oral charge to the jury as requested by defendant the following:

"The Court instructs the jury that if they believe from the evidence the boys Edward and Allen Britt on or about the afternoon of July 28, 1916, entered the premises of defendant without the knowledge of defendant and without any leave, license or invitation, and without any allurements exerted upon them before their entrance upon defendant's land, they were trespassers and defendant [owned] them no duty except to abstain from wilfully injuring them, and unless they find the defendant intended to injure them their verdict will be for the defendant."

XII.

Because the Court erred in not embodying in his oral charge to the jury as requested by defendant the following:

31 "The court instructs the jury that if they find from the evidence that the water by reason of which plaintiffs claim that their two sons lost their lives on or about July 28, 1916, had accumulated in the basement or cellar of a dismantled building on defendant's premises without the knowledge of defendant, and that that basement or cellar was in the interior of a large tract of land owned by defendant and was remote from and invisible to those

passing along the nearest highway, and the defendant left no poisonous materials in or about said basement or cellar at the time the building which covered said basement or cellar was removed on or about the fall of 1910 or 1911, then their verdict will be for the defendant.

XIII.

Because the court erred in charging the jury as follows:

"But the defendant in this case can be liable only in the event you find from the greater weight of all the credible evidence in the case that the premises, including this basement of water, or pond of water, as left there, was in its nature, and in its looks, on a day in July such as would be the 27th day of July in this country, both highly poisonous and alluring to the children, and if you further believe from the greater weight of all the credible evidence in the case that they lost their lives because of the fact that the pond was impregnated with this poisonous substance, of which the defendant either knew, or, by the exercise of ordinary prudence and caution for the protection of its property against a deadly or poisonous agency they would have had to have known."

XIV.

Because the Court erred in charging the jury as follows:

"Gentlemen of the jury, in this case, if you believe, as claimed here by the plaintiff, and believe it by the greater weight of all the credible evidence that this pond was poisoned, so that it was dangerous to the life of these children who you believe from the evidence could have protected themselves if it had been healthful water, and would have protected themselves in healthful water, but you further believe it was by reason of the poison in the water highly dangerous to them, and this danger was unknown to them, and if they were allured there to go in bathing believing it to be healthful water in which to bathe, but on account of its deadly poison they lost their lives, and the defendant left the poisonous substance there in this basement, or where the natural working of the elements would carry it into and poison this pool, then, in that event, you will find for the plaintiffs."

XV.

Because the court erred in sustaining the application of defendant in error for a nunc pro tunc entry amending the judgment of Honorable John C. Pollock, Judge of the District Court of the United States for the District of Kansas, Third Division, as follows:

"Now, on this 10th day of May, 1918, this cause came on for further hearing and it is by the Court ordered and adjudged that the said defendant, The United Zinc & Chemical Company, pay the costs of this action taxed in the sum of \$— and accruing costs, and go hence without day.

And to the aforesaid verdict of the jury and order and judgment of the Court the said defendant duly excepted and still excepts.

JOHN C. POLLOCK,

Judge

Filed in District Court May 10, 1918."

into a judgment in favor of plaintiffs Van Britt and Susie Britt and against defendant The United Zinc & Chemical Company for Five Thousand (\$5,000.00) Dollars, such judgment for costs and dismissal being beyond the power of the court to amend into an affirmative judgment in favor of plaintiffs and against defendant for Five Thousand (\$5,000.00) Dollars after the lapse of several terms of the court.

And for the further reason that no judgment was ever rendered at the May Term, 1918, as now sought to be entered nunc pro tunc, and because there does not appear in the record any memoranda on which to base the nunc pro tunc entry applied for.

Wherefore plaintiff in error prays that said judgment be reversed and that said District Court of the United States, for the District of Kansas, third Division, be ordered to enter a judgment reversing the decision of the lower court in said cause.

ASHLEY & GILBERT,

Attorneys for Plaintiff in Error.

Filed in District Court May 5th, 1919

Petition for Writ of Error.

The United Zinc & Chemical Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 10th day of May, 1918, comes now by Henry D. Ashley and William S. Gilbert, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Eighth Circuit, under and according to the laws of the United States in that behalf made and provided.

And your petitioner will ever pray.

ASHLEY & GILBERT,

Attorneys for Defendant.

Filed in the District Court May 5, 1919.

Order Allowing Writ of Error.

Upon motion of Henry D. Ashley and William S. Gilbert, attorneys for defendant, and upon filing a petition for a writ of error and an assignment of error, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Eighth Circuit the Judgment heretofore entered herein, and that the amount of bond on said writ of error for costs

only and not to operate as a supersedeas in any event be, and hereby is fixed at Five Hundred Dollars.

Dated May 5th, 1919.

JOHN C. POLLOCK,

Judge.

Filed in the District Court May 5, 1919.

(Bond on Writ of Error.)

Know all men by these presents, That we, the United Zinc & Chemical Company as principal, and P. W. Goebel as surety, are held and firmly bound unto the above named Van Britt and Susie Britt in the sum of Five Hundred Dollars, lawful money of the United States, and to pay to them and their respective heirs, executors and administrators; to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors, administrators and successors, by these presents.

Sealed with our seals and dated this 5th day of May, 1919.

Whereas, the above named, The United Zinc & Chemical Company has prosecuted a writ of error to the United States Circuit Court of Appeals Eighth Circuit, to reverse the judgment of the
34 District Court of the United States, District of Kansas, Third Division, in the above entitled cause,

Now Therefore the condition of this obligation is such that if the above named The United Zinc & Chemical Company shall prosecute its said writ of error to effect, and answer all costs, if it fail to make good its plea, then the above obligation shall be void, otherwise to remain in full force and effect.

THE UNITED ZINC & CHEMICAL
COMPANY,

[SEAL.]

By GEO. V. LEWIS,

Secretary & Treasurer.

P. W. GOEBEL.

Approved by

JOHN C. POLLOCK,

Judge.

Filed in the District Court May 5, 1919.

(Præcipe for Transcript.)

To the Honorable Frank L. Campbell, clerk of said court:

As we waive the printing of the record in the District Court, please prepare typewritten transcript of the record in the above entitled action for the use of the United States Circuit Court of Appeals, Eighth Circuit, same to consist of the following:

1. Mandate of the United States Circuit Court of Appeals, Eighth Circuit.

2. Motion for nunc pro tunc entry.
3. Journal entry sustaining said motion and containing other orders.
4. Petition for writ of error.
5. Assignment of Errors.
6. Order allowing writ of error.
7. Writ of Error.
8. Citation and acceptance of service thereof by attorneys for defendants in error.
9. Bill of exceptions with order allowing same signed by the Judge.
10. Order to record Mandate.
- 35 11. Bond with court's approval thereof.
12. Stipulation as to transcript of record.

ASHLEY AND GILBERT,
Attorneys for Plaintiffs in Error.

Filed in the District Court May 5, 1919.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Frank L. Campbell, Clerk of the District Court of the United States for the District of Kansas, do hereby certify the within and foregoing to be a full, true and complete transcript of the pleadings, proceedings and record, now on file and of record in my office, in a certain cause lately in said court pending, wherein Van Britt and Susie Britt are plaintiffs, and The United Zinc & Chemical Company, is defendant, as it purports to contain, and is made pursuant to the præcipe filed herein.

I further certify that the original writ of error and the original citation in this cause are transmitted herewith.

In Testimony Whereof, I hereunto set my hand and affix the seal of said court, at my office in Fort Scott, in said District of Kansas, this 11th day of June, A. D. 1919.

[Seal U. S. Dist. Court, Dist. of Kans., Third Div., 1892.]

FRANK L. CAMPBELL,
Clerk,

By C. N. PRICE,
Deputy Clerk, in Charge of the Third Division.

Filed Jun- 12, 1919, E. E. Koch, Clerk.

36

And thereafter the followings proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Plaintiff in Error.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5430.

UNITED ZINC AND CHEMICAL COMPANY, Plaintiff in Error,

vs.

VAN BRITT et al.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

HENRY D. ASHLEY.
WILLIAM S. GILBERT.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun- 14, 1919.

(Appearance of Mr. Fred Robertson as Counsel for Defendants in Error.)

The Clerk will enter my appearance as counsel for the Defendants in Error.

FRED ROBERTSON.
F. J. OYLER.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 18, 1919.

37 *(Appearance of Mr. F. J. Oyler as Counsel for Defendants in Error.)*

The Clerk will enter my appearance as Counsel for the Defendants in Error.

F. J. OYLER.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 22, 1919.

(Notice of Motion of Defendants in Error to Dismiss.)

To the above-named plaintiff in error and to its attorneys, Henry D. Ashley and William S. Gilbert:

You are hereby notified that at ten o'clock A. M. on December 16th, 1919, or as soon thereafter as the same can be heard, the defendants in error in the above entitled proceeding will present to the

United States Circuit Court of Appeals, Eighth Circuit, sitting at its court room at St. Louis, Missouri, their motion to dismiss the above entitled proceeding in error, copy of which motion is hereto attached, marked "Exhibit A."

VAN BRITT AND
SUSIE BRITT,

Defendants in Error,

By F. J. OYLER AND
FRED ROBERTSON,
Their Attorneys.

Service of the above notice to dismiss is hereby acknowledged this 25th day of November, 1919.

ASHLEY & GILBERT,
Attorneys for Plaintiff in Error.

38 (Copy of motion to dismiss, marked Exhibit A, omitted
at this place.)

(Endorsed) Filed in U. S. Circuit Court of Appeals, Dec 2
1919.

(Motion of Defendants in Error to Dismiss.)

The defendants in error move the court to dismiss this proceeding for the reasons as follows:

First. The writ of error (Record 32-33) was not sued out within six months after the entry of the judgment sought to be reviewed.

Second. The order directing entry nunc pro tunc (Record 8-9, also 24-25-26) was discretionary.

Third. No exception was taken or entered to the order (Record 8-9, also 24-25-26) directing entry nunc pro tunc.

Fourth. No true bill of exceptions has been allowed and signed as such upon which this proceeding in error can be based.

Fifth. This case has already been before this court and proceeding in error dismissed upon motion of defendants in error (Record 4).

VAN BRITT AND
SUSIE BRITT,

Defendants in Error,

By F. J. OYLER AND
FRED ROBERTSON,
Their Attorneys.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 3
1919.

39

(Order of Submission.)

December Term, 1919.

Tuesday, December 16, 1919.

This cause having been called for hearing in its regular order, argument was commenced by Mr. F. J. Oyler for defendants in error on their motion to dismiss, continued by Mr. Henry D. Ashley for plaintiff in error on said motion to dismiss and the merits, continued by Mr. F. J. Oyler for defendants in error on the merits and concluded by Mr. Henry D. Ashley for plaintiff in error on the merits.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein, and the motion of defendants in error to dismiss.

40

(Opinion.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1919.

No. 5430.

UNITED ZINC AND CHEMICAL COMPANY, Plaintiff in Error,

vs.

VAN BRITT et al., Defendants in Error.

In Error to the District Court of the United States for the District of Kansas.

Mr. Henry D. Ashley (Mr. William S. Gilbert was with him on the brief), for plaintiff in error.

Mr. F. J. Oyler (Mr. Fred Robertson was with him on the brief), for defendants in error.

Before Hook and Stone, Circuit Judges, and Lewis, District Judge.

LEWIS, *District Judge*, delivered the opinion of the Court.

The defendants in error, Van and Susie Britt, residents and citizens of Missouri, who were plaintiffs below, recovered a judgment against plaintiff in error for their damages on account of the deaths of their two sons Edward and Allen eight and eleven years old, which occurred in July, 1916. Plaintiff in error owned and operated, at Iola, Kansas, a plant at which it manufactured sulphuric acid and zinc spelter. It owned and still owns the tract (about 20 acres) in the outskirts of the town on which the buildings were situated, but in 1910 it tore them down, moved the wreckage and

machinery away, and since then has not occupied or used the land for any purpose. There was an enclosure around the tract, but when operations ceased and the plant was dismantled it fell away so that those passing were free to go at will, and made foot
41 paths across it. There was a basement containing acid tanks with lead pipes in and out under what was known as the tower building, and when it was torn down chemical refuse was thrown in the open basement. As the tanks and pipes were taken out some sulphuric acid got into the basement. Other chemical refuse was left about on the surface, and the old basement later became a pool of clear water from surface drainage, strongly impregnated with sulphuric acid and zinc sulphate. In July, 1916, Van and Susie Britt, traveling overland with their sons Edward and Allen, camped for a few days not far from the pool. The boys, in passing it one afternoon, responded to boyish impulses and went in bathing. In a short time after going in the younger was dead in the pool, the older was taken out, removed to a hospital and died two days later "from swelling of the bronchial tubes and gastro-intestinal irritation; irritation of the stomach and bowels, which produced an inflammation of the bowels and stomach." He had colicky pains, vomiting and gasping for breath. Expert testimony attributed both deaths to the poisonous chemicals in the water which had been taken internally. The water, when so taken, caused an immediate burning in the throat and choking; and applied outwardly it caused an itching and slight sense of burning.

The complaint was bottomed upon a local statute giving a right to recovery "when the death of one is caused by the wrongful act or omission of another." It charged that defendant carelessly and negligently left the pool of poisonous water open and exposed, and without enclosure, barrier, danger signals or warnings of any kind about it, well knowing, or by the exercise of reasonable care should have known, its dangerous character; that it maintained the poisonous pool and failed to fill it up.

The answer, after admitting ownership of the land in defendant's operation of its plant thereon from 1902 to September, 1910, the tearing down and removal of the buildings and machinery in the latter month, denied all other allegations.

At the close of the evidence the court refused to instruct a verdict for the defendant and submitted the case; instructing the jury that defendant had a right to maintain a pond of water on its premises, that if the water in the pool had not been poisonous but had been pure water and the children had gone into it in that condition and
42 been drowned plaintiffs could not recover; that, on the other hand, if the pool was attractive to boyish instinct and impulses as a place to go in bathing, and yielding they went in thus allured and their deaths resulted from the poison in the water, then the jury might find for plaintiffs; that it was immaterial whether they saw or could see the pool before they entered upon the tract; that if they had been of mature years they would have been trespassers and subject to a different rule, but that the law does not hold children of immature years to the same accountability as trespassers as it does adult persons.

There are many assignments of error, chiefly as to instructions given and refusal to give others, but they all come back to the contention, pressed on argument and developed in brief, of non-liability; and it may be conceded that there is good ground for debate, as the elaborate and able brief for plaintiff in error demonstrates. There is conflict in the cases as to the extent and under what conditions the principle *sic utere tuo &c.* may be carried against a landowner as a basis for liability on account of injuries to children resulting from dangerous attractions which he places upon or suffers to continue on his premises. There is less hesitation in its application against him where the thing complained of is, as here, put to no useful, ornamental or other purpose of enjoyment. It is also urged as error that the weight of the evidence disclosed that the pool could not have been seen by one off the premises standing in the nearest highway, or on the boundary line, or in the paths, and that the court told the jury that it was immaterial whether the boys saw it before they went upon the tract or after they were on it. In this the court doubtless had in mind two things, first, the undisputed fact that the public passed over it at will, so much so as to beat foot-paths across it, the further fact of its nearness to the homes of families, and second, the principle of law applied in cases like this that children of tender years are not classed with idlers, licensees or trespassers. 2 Shearman & Redfield on Negligence, Sec. 705. In *Pekin v. McMahon*, 39 N. E., 484 (154 Ill.), it is said: "Although a child of tender years, who meets with an injury upon the premises of a private owner, may be a technical trespasser, yet the owner may be liable, if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to the child, appealing to its childish curiosity and instincts. Unguarded premises, which are thus supplied with dangerous attractions, are regarded as holding out implied invitations to

43 such children." It is further urged that there is lack of proof of knowledge on the part of the owner that the tract was being used or visited by the public or by children, and that if the evidence shows such user or visitations they were wholly without invitation or consent; but on the facts adduced the law imputes both knowledge and consent. In *N. P. Ry. Co. v. Curtz*, 196 Fed. 367, it is said: "The occupant or owner of premises who invites, either expressly or impliedly, others to come upon them, owes to them the duty of using reasonable and ordinary diligence to the end that they be not necessarily or unreasonably exposed to danger; and an implied invitation to another to enter upon or occupy premises arises from the conduct of the parties, and from the owner's knowledge, actual or imputed, that the general use of his premises has given rise to the belief on the part of the users thereof that he consents thereto."

In short, an examination of the authorities, both State and Federal, fails to convince that the court erred in submitting the case or in the instructions given and refused. We think this conclusion is sustained by the opinion of the Supreme Court in *Railway Co. v. MacDonald*, 152 U. S. 262, and by *Railway Co. v. Curtz*, *supra*; *Lumber Co. v. Thompson*, 215 Fed. 8; *Chesko v. Delaware & Hud-*

son Co., 218 Fed. 804; Snare & Triest Co. v. Friedman, 169 Fed. 1; also by the Supreme Court of Kansas in Roman v. Leavenworth 133 Pac. 551, s. c. 148 Pac. 746; Kansas City v. Siese, 80 Pac. 626; Light & Power Co. v. Healy, 70 Pac. 880. Many like cases from other states could be cited.

The trial was concluded on May 10, 1918, and this was the verdict brought in and then entered of record: "We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, and assess his damages at \$5,000. C. O. Bollinger, Foreman." Unless a stay order was made on return of verdict, it was and for many years had been the practice to enter judgment in accordance with the verdict. No other or different judgment could be entered lawfully. That was the last day of the term, and after adjournment a new and inexperienced deputy clerk wrote this into the record: "Now, on this 10th day of May, 1918, this cause came on for further hearing and it is by the court ordered and adjudged that the said defendant, the United Zinc and Chemical Company, pay the costs of this action taxed in the sum of \$—, and accruing costs, and go hence without day." The court did not order the

entry of what the deputy clerk wrote up. It was without
44 right to make any such order on the record of the case as it stood at that time. The mistake was not discovered until the case came on for argument here on a prior writ, when attention was called to the fact by one of the Judges of this Court, and there was dismissal. At the next term below (May, 1919), the Britts moved that appropriate judgment be entered on the verdict *nunc pro tunc*, which was done. That action is assigned as error.

In Lincoln National Bank v. Perry, 66 Fed. 887, judgment was in favor of the five named defendants in an action at law. The writ was sued out against only two of them, and when the cause came here there was a motion to dismiss for non-joinder. The plaintiff then went back to the trial court and succeeded in having the judgment corrected *nunc pro tunc* by eliminating therefrom three of the defendants named in it, on a showing that two of them had not been served with process, that the other did not appear and participate in the trial, and that there was no issue between the three and the plaintiff. The corrected judgment was certified, and when the motion for dismissal for non-joinder came on again this court said: "We are not prepared to admit that the Circuit Court exceeded its power, in undertaking to amend its record in the manner aforesaid, if it was satisfied that through accident or inadvertence, or a misprision of the clerk, the record did not in fact speak the truth. * * * It seems, also, that the power to thus correct mistakes in the record may be exercised within any reasonable period, even after the lapse of the term at which the mistake was committed. * * * The record was false in point of fact, and the Circuit Court so found, in that it recited that Lane, Kent, and Kelley had appeared and defended the suit, and that the court had actually rendered a judgment in their favor, whereas, Lane and Kent had not ever been served with process and the court had not tried any issue, as between the plaintiff bank and either of said three defendants, and had not rendered a judg-

ment in favor of either of them. The judgment actually spread of record was the act of the clerk, and in no sense the act of the court." The nunc pro tunc order operated as an amendment of the record by inserting the amount of the verdict to be recovered and striking out the discharge of the defendant. In *Hickman v. Fort Scott*, 141 U. S. 415, it is said to be the rule "that a court, after the expiration of the term, may, by an order nunc pro tunc, amend the record by inserting what had been omitted by the act of the clerk or of the court."

See also *In re Wight*, 134 U. S. 136; *Barnard v. Abel*, 156 Fed. 649; *Odell v. Reynolds*, 70 Fed. 656; *Phillips v. Negley*, 117 U. S. 665; *City of Manning v. Ins. Co.*, 107 Fed. 52. The court did not err in sustaining the plaintiffs' motion for the order.

Affirmed.

Filed April 13, 1920.

46

(Judgment.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1919.

Thursday, April 29, 1920.

No. 5430.

UNITED ZINC AND CHEMICAL COMPANY, Plaintiff in Error.

vs.

VAN BRITT and SUSIE BRITT.

Error to the District Court of the United States for the District of Kansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and upon the motion of Defendants in Error to dismiss, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that said motion to dismiss be, and the same is hereby, denied and that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Van Britt and Susie Britt have and recover against the United Zinc and Chemical Company the sum of twenty dollars for their costs herein and have execution therefor.

April 29, 1920.

47 United States Circuit Court of Appeals, Eighth Circuit.

No. 5430.

UNITED ZINC AND CHEMICAL COMPANY, Plaintiff in Error,

vs.

VAN BRITT et al., Defendants in Error.

Petition for Rehearing.

Having carefully examined the opinion of the Honorable Court we think that with propriety, we may ask the Court to consider whether this case be not one in which it will be proper to grant a rehearing to the plaintiff in error for the following reasons:

1. Because, it is respectfully submitted, the decision of this Court rendered by the Court is contrary to the decision of this Court in *Duree v. Wabash Railway Co.*, 241 Fed. 454, the last controlling decision of this Court, which was called to the Court's attention by plaintiff in error on page 53 of its first brief and by counsel in oral argument and is not referred to or cited by this Court in its opinion.

In the *Duree* case plaintiff's intestate, a boy of 11½ years old, was killed while riding at the invitation of the engineer on a locomotive owned by defendant, and the question was whether the defendant owed the intestate any duty, it being decided that the engineer had no authority to invite the child to ride. On this point the Court said:

"In the case presented by the record there is no question of contributory negligence involved in the inquiry or essential to its consideration. If the defendant did not owe the duty of protection against the injury complained of, then the omission to furnish such protection does not constitute such negligence on its part as will warrant a recovery therefor against it. From the facts of the case it is perfectly plain that the plaintiff's intestate did not sustain to the defendant company the relation of a passenger, there was no contract, either express or implied, for his transportation, and he was not, therefore entitled to that high degree of care to which a common carrier is held for the safety of those who have paid fare for their transportation as passengers. On the contrary we think his relation to the defendant company, whether technically so or not, was in contemplation of law, that of an intruder or trespasser, and the defendant owed him no duty, except the negative one, not maliciously, wantonly, or with gross and reckless carelessness to injure him. And the fact that the deceased in the present case was a boy 11½ years old cannot affect the application of the rule, for the reason that the absence of duty is the same as in the case of an adult and the consequent absence of liability, must be the same in both."

It is true that this Court in the Durce case does say, "That children can recover for injuries in circumstances in which adults cannot," and then significantly adds "But there can be no recovery even in the case of a child, unless there is negligence, and there can be no negligence without a breach of duty." * * *

The Court then arguendo says "The only duty which is, or can be claimed as having been violated was duty to protect plaintiff's intestate when riding upon the engine from injury by derailment of the engine or otherwise; but we are wholly unable to see how any such duty can arise out of the circumstances of this accident. Clearly this boy was where he had no legal right to be."

In this case at bar defendant insisted that the Britt boys were where they had no legal right to be.

49 The record shows that the defendant's tract of land was in the outskirts of Iola, Kansas, and consisted of about 20 acres of barren land, littered with debris. It was 1,000 feet wide from East to West, and 1,200 feet long from North to South, and the abandoned cellar in which the children went bathing and met their death, was in the middle of the tract. That there was a road 120 feet West of the cellar running North and South, which had been worn by the defendant and its employes, through the tract. It is equally clear from the evidence that from this road the cellar was not visible. The evidence also shows that the boys with their companions entered defendant's tract from the North, and were traveling along this road towards the Southern extremity of the tract on their way towards their father's camp which was a few blocks South of defendant's factory site. The children were on this road when last seen before the accident. There is no evidence in the record to show what attracted them to the water-filled abandoned cellar, nor is there any evidence of foot paths leading to the cellar, and it certainly was not near their home, which the record discloses was in Springfield, Missouri. So that the supposition of this learned Court that the trial Court had in mind the nearness of this tract to the homes of families and the frequency of foot paths across it, is not supported by the record.

One witness, Stockton, testified that he lived about 80 rods from the "pool," and there is no evidence of others living near by. (R. 76.)

At the time these premises were abandoned there was a substantial fence about this entire tract, but at the time of the accident the fence had disappeared.

At common law which is in force in Kansas, by statutory enactment, there is no obligation on the part of landowners to maintain fences about their land, and there is no statute in Kansas which requires it.

Union Pac. Ry. Co. v. Rollins, 5 Kan. 177.

50

Owners of unenclosed land are not required to make them safe for trespassing cattle.

Knight v. Abert, 6 Penn. St. 472;

Hughes v. Railroad, 66 Mo. 325.

In *Felton v. Aubrey*, 74 Fed. L. C. 356, Judge Lurton delivering the opinion of the Circuit Court of Appeals for the Sixth Circuit in a case where a child was injured while on the defendant's right of way, says:

"Neither is the fact that it (the railway) crossed an open common of any significance in the determination of the legal right of the company to exclude all persons from its right of way. That it is unfenced is equally unimportant."

The fact that there was a roadway through defendant's land, by which the Britt children entered said tract for their convenience in reaching their father's camp, did not authorize them to stray from this roadway, and if they did, it was at their peril. And the defendant by merely suffering or permitting such voluntary use, came under no obligation that its premises were either fit, safe or suitable, or that they would remain so.

Felton v. Aubrey (supra).

In addition to *Durce v. Wabash Ry. Co.* and *Felton v. Aubrey* already cited, there is the recent case of *McCarthy v. Railroad*, 240 Fed. 602, where the Circuit Court of Appeals for the Second Circuit held "That an infant of 7 years old who was killed on the defendant's right of way was a trespasser, and that his administrator could not recover for his death, the Court saying "Any person who goes upon the premises of another is a trespasser if he goes there out of curiosity or for his own purposes, and without invitation, express or implied, and not in performance of a duty to the defendant. A child of tender years may be a trespasser."

See also *Hastings v. Southern Ry. Co.*, 143 Fed. 263 where the Circuit Court of Appeals of the Fourth Circuit held that an 8 year old boy killed by defendant on its right of way could not recover because he was a trespasser." * * *

51 2. Because, this court in reply to plaintiff in error's contention that in case at bar, "There is lack of proof of knowledge on the part of the owner that the tract was being used or visited by the public or by children, and that if the evidence shows such uses or visitations, they were wholly without invitation or consent" says: "But on the facts adduced the law imputes both knowledge and consent" (Opinion page 4), and supports its decision on this point by citing *N. P. Ry. Co. v. Curtz*, 196 Fed. 367, from which it quotes the following paragraph:

"The occupant or owner of premises who invites, either expressly or impliedly, others to come upon them, owes to them the duty of using reasonable and ordinary diligence to the end that they be not necessarily or unreasonably exposed to danger; and an implied invitation to another to enter upon or occupy premises arises from the conduct of the parties, and from the owner's knowledge, actual or imputed, that the general use of his premises has given rise to the belief on the part of the users thereof that he consents thereto."

The facts in the Curtz case are as follows:

The injury occurred not on the private property of the plaintiff in error, but upon a public street of the City of Tacoma, where it was the custom of the railroad company for many years to store its empty wheat cars. Prior to the accident, men, boys and girls daily and openly and with the knowledge of the railroad employes, went into such empty cars to sweep up and gather loose wheat. There was evidence that the switchmen frequently told boys where the wheat could be found in the cars, and there was testimony that but a few minutes before the injury complained of a switchman directed the defendant in error to the cars in one of which the defendant in error was sweeping wheat at the time of the injury.

There was also evidence to show that the company itself knew that the children were in the custom of sweeping the wheat in these cars.

Under these circumstances the Court held that there having been proof to go to the jury to show that the defendant in error was a licensee and not a trespasser it was a question for the jury to determine whether the Railroad Company was negligent in bumping so violently these wheat cars with a locomotive and other freight cars, as to throw the defendant in error out of the car under the wheels of the train.

These undisputed facts show that defendant railway had actual knowledge that men, women and children visited these empty wheat cars daily to glean the wheat scattered upon the car floors, and that they were expressly invited to do so by the company's switchmen. We therefore respectfully suggest to the Court that what is said by the court in the Curtz case in the paragraph excerpted by this Court about "imputed knowledge" and "implied invitation" is the purest dicta even when applied, to the facts in the Curtz case, and can be no authority in the case at bar, where the evidence shows that the plaintiff in error was absolutely without actual knowledge either that there existed in its premises anything that could portend danger to anybody; and where there was no evidence that any children ever before visited its premises, and where the defendant in error's children lived in another state and had never been on the premises before the day of the unfortunate catastrophe.

Likewise in *Railway v. MacDonald*, 152 U. S. 262, the agents and officers of the Railway Company had actual notice of the existence of the slack pit's dangerous condition for two years notwithstanding which they left it unfenced in spite of a Statute of Colorado, which besides making it a misdemeanor to leave slack pits unfenced, punishable by fines, and also gave the injured party a right of action to recover for any damages sustained.

It was this Statute which saved plaintiff's petition from being deniable.

MacDonald v. Union Pacific Ry. Co., Brewer, J., in 35 Fed. 38. See our first brief, p. 46.

The other cases cited by this Court on page 4 of the Court's opinion we respectfully submit are equally distinguishable from the case at bar, as a brief résumé will show.

53 In *Lumber Co. v. Thompson*, 215 Fed., 8:

The well was dug by defendant's agent and left by it uncovered and filled with water. Children had been long in the habit of playing in that vicinity, which was known by the defendant, or should have been known.

The same Court in *Great Northern Ry. Co. v. Willard*, 238 Fed. 714, distinguished the *Thompson* case and declared that the doctrine of that case would not be extended to the case then before it.

In *Chesko v. Delaware & Hudson Co.*, 218 Fed., 804:

Defendant had a machine shop 6 feet back from a much travelled street. Its moving machinery was visible from the sidewalk through a wide double door. This door was kept open during warm weather and there was no guard, rail or screen to prevent the entry of children. The proofs showed that children were permitted to enter through this open door. Plaintiff aged 6 entered through this open door and while watching the men at work his hand was caught by an unguarded revolving cog wheel and injured.

The jury found "that the defendant had not exercised such judgment and care under the circumstances as a person of ordinary prudence would use in warding off children and guarding them against the danger that the allurements of the place might offer."

In this case the allurements confronted the child on the public street and there were men at work when the six year old child entered the machine shop, who should have excluded him at sight.

This case follows *Snare & Triest Co. v. Friedman*, 169 Fed. 1, which is also cited by this Court, where a child plaintiff was injured, while on the sidewalk of a public street, where she had a perfect legal right to be, by the fall of an iron girder, which was unsecurely piled in a heap on both sides of the sidewalk. The defendant in this case would have been liable if plaintiff had been a mature individual passing along the city sidewalk and was injured by a fall of an iron girder because of the careless way in which it was left by the defendant.

54 In *Roman v. City of Leavenworth*, 133 Pac. 551; 90 Kan. 379, plaintiff a child 11½ years old was hurt by reason of a smouldering fire in a city dump. The City actually knew that children played there and were attracted by the dumping of spoiled fruit, but took no precautions to drive them away. This was obvious negligence. The child was excused by his tender years from contributory negligence.

K. C. v. Liese, 80 Pac. 626, follows the *Price* case, though Judge Cunningham who wrote the opinion of the Court in a dissenting opinion states that the *Price* case carries the turn table cases far

beyond the danger limit. For Price case see our second brief page 30; 50 Pac. 450.

3. Because it is respectfully submitted that this learned Court in citing *City of Pekin v. McMahon*, 39 N. E. 484; 154 Ill. 141 as authority in support of the trial court's instruction that "it was immaterial whether the Britt children saw the pool before they went on the defendant's land or discovered the pool after they were already on the land," misapprehended the admitted facts in that case, which completely differentiate it from the case at bar and which make it inapplicable as an authority in the case at bar.

In the *Pekin* case the vacant lots owned by the City were in a thickly settled part of the City. They had originally contained a water course which the City had deepened by removing sand therefrom, so that a deep pit was created. That boys had been in the habit of playing upon planks and logs in the water in the pit, and had fallen into the water; that the City authorities had been notified by parents of the danger and requested to remove it; that the dangerous condition continued a year before the accident; there was an ordinance declaring such an excavation containing water a nuisance and requiring same to be fenced or drained.

The Court after premising that the general rule was well settled, that a private owner of land is under no obligation to strangers to place guards around excavations upon his land states that an exception exists in favor of a child of tender years, though a technical trespasser, says:

55 "Where the land of a private owner is in a thickly settled city, adjacent to a public street or alley, and he has upon it, or suffers to be upon it, dangerous machinery, or a dangerous pit, or pond of water, or any other dangerous agency, at a point thereon near such public street or alley, of such a character as to be attractive to children of tender years incapable of exercising ordinary care, and he is aware or has notice of its attractions for children of that class we think he is under obligations to use reasonable care to protect them from injury when coming upon said premises, even though they may be technical trespassers. To charge him with such obligation under such circumstances is merely to apply the well known maxim, *sic utere tuo ut alienum non laedas*."

In addition to the actual notice that the place was frequented by children and the warning notice given by parents that the place was dangerous, there was an ordinance of the City of Pekin, declaring places of the same character as the locus in quo a public nuisance, and ordering their abatement by drainage or by securely fencing them.

We respectfully submit that these undisputed facts not only substantiate our claim that the *Pekin* case is not an authority against plaintiff in error, but shows that in that case the plaintiff below proved all facts that we have contended the Britts should have proved to show that they came within the exception to the common

law created in a few jurisdictions in favor of immature children, who by a legal fiction are considered to have been impliedly invited, by the landowner to enter his premises by reason of the fact, that his premises contained something so attractive to the child's instincts for play or curiosity, as to be beyond his childish powers of resistance.

The Supreme Court of Illinois in a later case (to which we called the Court's attention in our first brief, p. 47, and in oral argument,) while quoting from and approving the Pekin case, adds that "it is a necessary element of the liability that the thing which causes the injury is tempting to children and constitutes a means of attracting them upon the premises, which the owner should anticipate. The dangerous thing must be so located as to attract them from the street or some public place where they must be expected to be."

If the Court accepts the fiction, which makes an attraction to children located on one's premises tantamount to an invitation, it should require that the child should at least see the attraction before yielding to its temptation. In other words to be valid the invitation should be given.

4. Because we respectfully submit that this Court in applying the maxim *sic utere tuo* etc. to the case at bar for the reason that the plaintiff in error had a dangerous attraction on its premises, which it put to "no useful, ornamental or other purpose of enjoyment," has misunderstood or misapprehended the record.

The record shows that the large tract of land owned by the plaintiff in error and which had been used by it beneficially for a number of years had become useless, because of the exhaustion of the gas fields, and that consequently for economic reasons, it had been forced to cease using said land, which was its misfortune and not its fault. That in attempting to salvage all that was of removable value, it necessarily left behind it the foundation of the building which had been used in manufacturing sulphuric acid; and that it afterwards by circumstances of the most fortuitous character, (such as the diversion of the surface water by the stoppage of a drain) filled up with water which was impregnated with chemicals absorbed from the soil, which was another misfortune for which it certainly was not morally culpable, since it happened without its volition or actual knowledge, and could not reasonably have been foreseen. The implication from the Court's opinion is, that the plaintiff was maintaining an attraction upon its premises dangerous to children without the justification of its deriving use, ornament, or pleasure, but out of mere wantonness as it were, and that therefore the Court overcame its hesitation and applied the maxim *sic utere tuo* etc. as a basis to create a legal liability on the part of plaintiff in error.

If as this Court itself remarks "There is conflict in the cases as to the extent and under what conditions the principle *sic utere tuo* etc. may be carried against a landowner as a basis for liability on account of injuries to children, we cannot see why the learned Court resolved its doubts against the plaintiff in

error, and applied the maxim, as it were in punishment for unjustifiable conduct.

We further respectfully suggest the maxim *sic utere tuo ut alienum non lædas*, is not the enunciation of a legal principle which can be of use in the solution of difficult legal propositions but is a moral precept, which as Mr. Justice Holmes says "teaches nothing but a benevolent yearning", 8 Harvard Law Review page 3; and which according to Prof. Terry, "Belongs to the class of extra-legal principles—which we may call legislative, because they serve as guides to show how the law ought to be made."

Terry's Leading Principles of Anglo American Law, Sections 10, 11.

"The maxim *sic utere tuo ut alienum non lædas* is mere verbiage. A party may damage the property of another when the law permits; and it may not where the law prohibits: So that the maxim can never be applied till the law is ascertained: and when it is the maxim is superfluous."

Erle J., in *Bonomi v. Backhouse* El. Bl. & El., 622, p. 643.

See also *The Use of Maxims in Jurisprudence*, 8 Harvard Law Review, 13.

"That maxim that a man must use his property so as not to incommode his neighbors, only applies to neighbors who do not enter, interfere with or enter upon it."

Frost v. Eastern R. R. Co., 64 N. H. 220-222.

It refers only to "acts, the effect of which extends beyond the limits of the property."

Ratte v. Dawson, 50 Minn. 450-453.

58 5. Because the case at bar involves the solution of a legal question which has caused great diversity of opinion among the courts of last resort throughout the United States, both State and Federal, depending upon whether they adhered to the common law, or swayed by sentiment devised new rules to meet hard cases.

The question for this Court to decide is whether it shall extend the doctrine of the so-called "turn-table" case to what is known as the "attractive-nuisance" cases, and if so, whether it shall go to the full limit of the most radical proponents of that doctrine, which virtually makes the landowner an insurer of the safety of all children of tender years, who pursuant to childish whims and impulses intrude upon his land, without his leave, license, invitation or actual knowledge, and finds there dangerous machinery, pools, pits, uncovered cisterns or other latent dangers, by which they are injured or killed. The presence of the child is taken to show that it was attracted on the premises, else it would not have been there, and the injury received is proof, after the fact, that a reasonable man should have anticipated what actually happened, and therefore should have taken such precautions as would have prevented its occurrence.

The more conservative of the Courts, which have absolved themselves from the trammels of the common law rules in order to follow the attractive nuisance doctrine, do so upon the theory that the landowner by having something on his land, (which is visible from the high road, or where children are accustomed to congregate) so attractive to childish curiosity or instincts, as to be beyond their powers of resistance, has impliedly invited them to enter and thus becomes responsible for their safe conduct. This Court, however, by approval of the trial court's instructions which tell the jury that "It was immaterial whether the (Britt children) saw or could see" the "attractive nuisance" before they entered the land of the plaintiff in error, "for if anything, curiosity or otherwise, brought them upon the premises and they then saw the pool, which was attractive to them to go in swimming on account of the heat, and their

death was caused by its poisonous condition," disregards the necessity of an implied invitation, and declares that an immature child cannot be a trespasser and that his entrance alone upon the landowner's premises entitles him to protection from all latent dangers, even though the landowner himself had no notice of the probability of his presence, or of the existence of a latent peril.

The question here presented is one of first impression in this court and the opportunity is here presented to put a quietus upon a dangerous heresy by keeping within the well known landmarks of the common law, and by leaving changes in the law to be made by the legislature where they belong.

Respectfully submitted,

HENRY D. ASHLEY,
WILLIAM S. GILBERT.
Attorneys for Plaintiff in Error.

I, Henry D. Ashley, counsel for the plaintiff in error herein hereby certify that in my judgment the foregoing petition for a rehearing is well founded and that the same is not interposed for delay.

HENRY D. ASHLEY

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 21, 1920.

60 (*Order Denying Petition for Rehearing.*)

May Term, 1920.

Monday, August 2, 1920.

This cause came on this day to be heard upon the petition for rehearing, filed by Counsel for Plaintiff in Error.

On consideration whereof, it is now here ordered by this Court that said petition for a rehearing of this cause, be, and the same hereby, denied.

August 2, 1920.

61

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Kansas, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein United Zinc and Chemical Company was Plaintiff in Error, and Van Britt et al., were Defendants in Error, No. 5430, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-fifth day of August, A. D. 1920, a mandate was issued out of said Circuit Court of Appeals, directed to the Judges of the District Court of the United States for the District of Kansas.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this nineteenth day of October, A. D. 1920.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.*

62 United States Circuit Court of Appeals, Eighth Circuit.

No. 5430.

UNITED ZINC AND CHEMICAL COMPANY, Plaintiff in Error.

VS.

VAN BRITT et al.

Stipulation.

It is hereby stipulated, By and between the parties to the above-entitled action, that the certified transcript of the record in the above entitled cause heretofore filed in the Supreme Court of the United States in connection with the Petition of the Plaintiff in Error for a writ of certiorari, and now on file in said Supreme Court,

shall be taken as a return to the writ of certiorari granted in said cause dated, November 24th, 1920, and that a certified copy of this stipulation shall be transmitted by the Clerk of this Court to the Supreme Court as his return to the said writ of certiorari.

HENRY D. ASHLEY,
WILLIAM S. GILBERT,
Attorneys for Plaintiff in Error.
F. J. OYLER,
FRED ROBERTSON,
Attorneys for Defendant in Error.

(Endorsed:) No. 5430. United Zinc and Chemical Co., Plaintiff in Error, vs. Van Britt and Susie Britt. Stipulation as to Return to Writ of Certiorari. Filed Dec. 11, 1920, E. E. Koch, Clerk.

63 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which the United Zinc and Chemical Company is plaintiff in error, and Van Britt and Susie Britt are defendants in error, No. 5430, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Kansas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into

the Supreme Court of the United States, do hereby command
64 you that you send without delay to the said Supreme Court as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of November, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

65 [Endorsed:] File No. 27,960. Supreme Court of the United States, October Term, 1920. No. 603. United Zinc and Chemical Company vs. Van Britt and Susie Britt. Writ of certiorari. Filed Dec. 11, 1920. E. E. Koch, clerk.

Return to Wit.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of the United Zinc and Chemical Company, Plaintiff in Error, and Van Britt and Susie Britt, No. 5430, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fourteenth day of December, A. D. 1920.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.*

66 [Endorsed:] File No. 27,960. Supreme Court U. S., October Term, 1920. Term No. 603. United Zinc and Chemical Co., Petitioner, vs. Van Britt and Susie Britt. Writ of certiorari and return. Filed Dec. 17, 1920.

(3403)



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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1921.

UNITED ZINC AND CHEMICAL COM-
PANY, *Plaintiff in Error,*

vs.

VAN BRITT AND SUSIE BRITT,
Defendants in Error.

No. 164

Brief in Behalf of Plaintiff in Error.

HENRY D. ASHLEY,
WILLIAM S. GILBERT,
Attorneys for Plaintiff in Error.

Of Counsel

Henry D. Ashley.

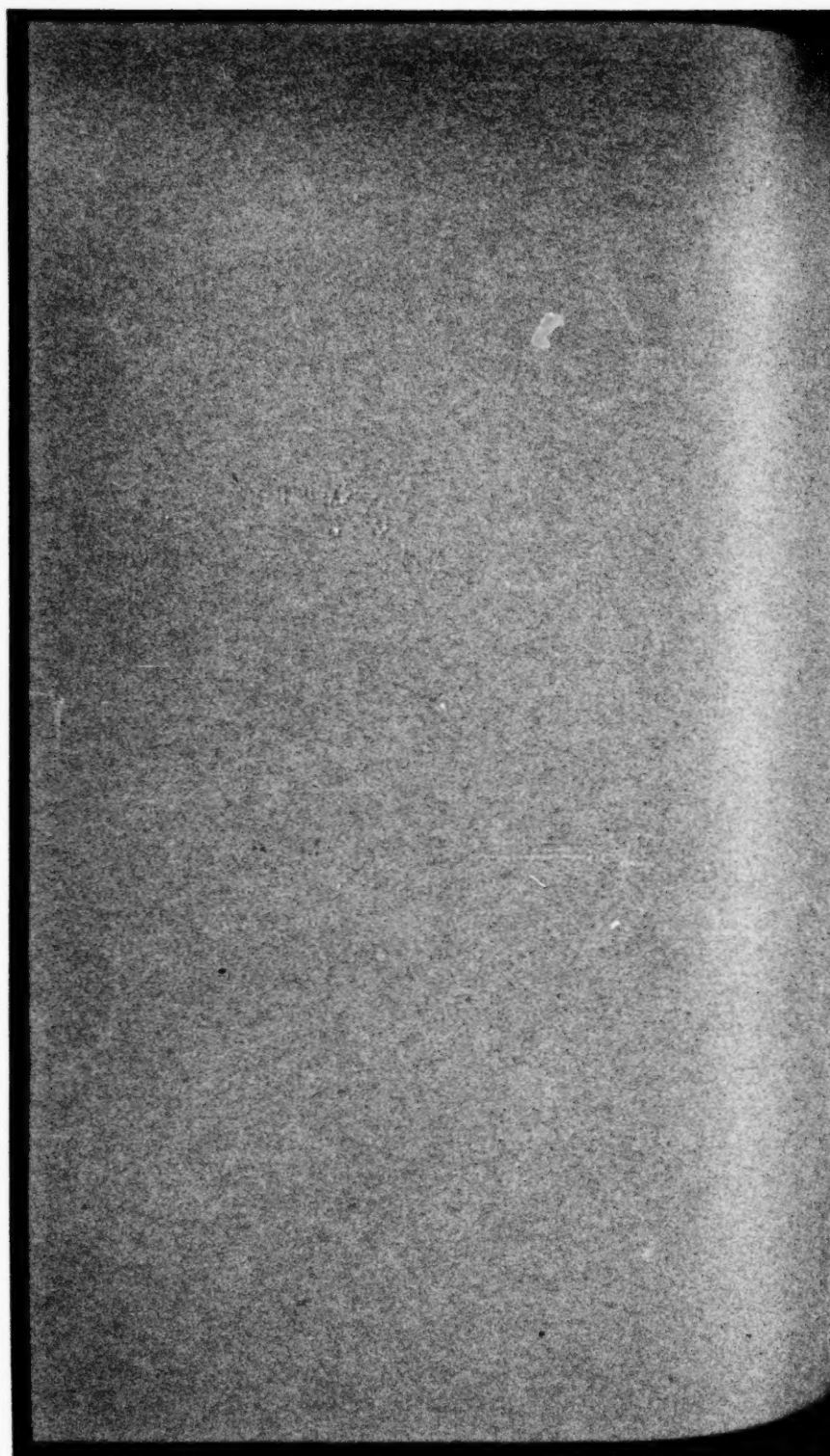


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—IN THE—
Supreme Court of the United States

OCTOBER TERM, 1921.

UNITED ZINC AND CHEMICAL COM-
PANY, *Plaintiff in Error*,

vs.

VAN BRITT AND SUSIE BRITT,
() *Defendants in Error.*

No. 164

Brief in Behalf of Plaintiff in Error.

STATEMENT.

This case comes here on a writ of *certiorari* to review the decision of the United States Circuit Court of Appeals for the Eighth Circuit, affirming the judgment of the United States District Court of Kansas, dated April 29, 1920; a rehearing of which was denied by said Court of Appeals on August 2, 1920.

This action was brought by Van Britt and Susie Britt, respondents and plaintiffs below, to recover

Twenty Thousand (\$20,000.00) Dollars damages from the United Zinc & Chemical Company, a New Jersey corporation, plaintiff in error and defendant below, for the alleged causing of the death of plaintiffs' two sons, Edward and Allen aged respectively, eight and ten years.

The petition was in two counts; one of which stated the death of Edward, and the other, the death of Allen; and in each of which the sum of Ten Thousand (\$10,000.00) Dollars was asked as damages.

The *allegations* common to both counts of plaintiffs' petition are: "That defendant owned and occupied a tract of twenty (20) acres of land near Iola, Kansas, upon which it maintained a zinc smelting plant, and manufactured spelter and sulphuric acid, from 1902 to 1911, or thereabouts; that on or about said latter date, it ceased operating said plant and removed most of its buildings and all its machinery; that during the period in which defendant operated its plant, it maintained, and still maintains, a pool of poisonous water forty-two (42) feet by one hundred (100) feet, walled with brick and stone for the purpose of containing the waste and overflow water which had been used by it in the manufacture of spelter and sulphuric acid; that this water was impregnated with sulphuric acid and other deadly poisons, but was perfectly clear and apparently wholesome; that when the defendant ceased operating its plant and removed its buildings and

machinery as aforesaid, it wantonly, wilfully, carelessly and negligently failed to fill up said pool of poisonous water, or in any manner to enclose it, or erect about it any barriers, danger signals, signs or warnings, to warn persons or children from playing, bathing or swimming therein and drinking it; that in consequence of the fact that the water was perfectly clear, it was an inviting place for children of immature years to gather, congregate, enter, bathe and play, and its real condition could only be discovered by coming into actual contact therewith; that on July 27, 1916, plaintiffs, accompanied by their four children, passed through Iola, Kansas, in a covered wagon, and camped on the Eastern edge of Iola, a distance of a couple of hundred of yards from said poison pool; that plaintiffs and their sons were total strangers in the City of Iola and surrounding country and had no knowledge that a zinc and acid plant had ever been operated on the ground aforesaid and had no knowledge that a pool of water existed at said place or that said water was poisonous, or that the place was dangerous; that on the afternoon of the next day (July 28, 1916), which was a very hot, dry and sultry afternoon, their sons Edward and Allen were playing near said pool of poison water when they discovered it contained very clear, and apparently wholesome, cool, pure water, and from all appearances was a perfectly safe place to enter and bathe; and their son Edward undressed and entered said water for the purpose of bathing,

when the poisons contained in said water overcame him and so poisoned him that he lost control of himself and was unable to regain the bank, and died almost instantly as a direct result of the deadly poisons contained in the said water; that defendant well knew that the water in said pool contained deadly poisons, as aforesaid, and that it would cause the immediate death of anyone who entered therein, or could have known it by the exercise of ordinary care, but carelessly, wantonly and wilfully left the same open and exposed, without barriers or warnings of any kind to warn persons or children from entering therein.

In addition to these allegations common to both counts, the second count states: "That Allen Britt (the elder brother) having observed that Edward who had gone into the pool and was unable to reach the bank, and seeing him go down under the water and that he was in great danger, jumped into the pool to rescue his brother from death, and he too was overcome by the poisons in said water and died the next day as the direct result of having come into contact with the poisonous water in said pool.

The evidence shows that defendant operated a zinc spelter and sulphuric acid plant on the Eastern outskirts of Iola, Kansas, from 1902, until September 1, 1910, when it shut down its plant and began to remove its machinery and to strip its buildings of everything that was movable. Between September 1, 1910, and January 1, 1911, this dismantling

process was completed and all the portable property of defendant was removed.

Plaintiffs made no attempt to prove the allegation in their petition that defendant while operating its plant maintained a pool of poisonous water into which it ran waste and overflow water used in the manufacture of its spelter and sulphuric acid, and the evidence shows that there was no such pool and no need for such a pool since the process of making sulphuric acid takes place entirely within lead towers, lead chambers and lead pipes, and when the acid was made it was driven by pumps into storage tanks located on a railroad switch at some distance away, where it awaited shipment to market in metal tank cars. R. 62-63-65-111-114.

The *evidence discloses* that the "pool," alleged in plaintiffs' petition to have been "walled with brick and stone" and filled with "perfectly clear water," "crystal-like in appearance" forming "an attractive and inviting place for children of immature years to gather, congregate, enter, bathe and play," was in fact the basement or cellar left standing after the removal of one of the buildings of defendant, known as the "Tower Building," from the fact that it contained a Glover tower and two Gay-Lussac towers. It also contained lead pipes, and water tanks, pumps, and other machinery for manufacturing sulphuric acid by what is known as the "chamber process." All these towers, tanks, pipes and machinery were removed from this building in

the fall of 1910, under the supervision of Richard Friebe, who had been in the employ of defendant as superintendant of its acid department. The building itself was sold to William Lanyon, who later removed all the superstructure, leaving the basement, and this basement afterwards filled up with surface water, which found access to it through a doorway in the basement on the northeast side (R. 57). It was *this basement* filled with surface water long after the superstructure of the building had been removed by the purchaser and after the plant had been abandoned, and defendant's officers and employees had departed to other cities, that in fact was the place referred to in plaintiffs petition as a "pool."

This basement was 96 feet long, 40 feet wide and 5 feet deep, and had within it near its center another cellar or pit which was 38 feet long, 14 feet wide and $4\frac{1}{2}$ to 5 feet deep. A diagram of this basement is shown in the Record at page 102-A, which is marked Exhibit 11.

The depth of the water in this basement varied from time to time, according to the season of the year, and the amount of rainfall, evaporation, etc. At the time of the accident the water was about 2 feet deep in the cellar proper and a little over 7 feet deep in the pit.

This basement stood midway between the north and south boundaries of the 20-acre tract which had formed the factory site occupied by defendant, and

it could not be seen "until one got well on the land of defendant" (R. 30, 41, 51, 89).

This entire tract is now, and was at the time of the accident, a barren waste, unrelieved by vegetation of any sort, and littered with brickbats, scraps of metal, and every sort of rubbish (R. 92-A, Ex. 4; 92-B, Ex. 5; 92-C, Ex. 6; 92-D, Ex. 7; 92-E, Ex. 8; 92-F, Ex. 9).

On the afternoon of July 27, 1916, nearly five years after the premises had been vacated by defendant, plaintiffs accompanied by their four children, having passed through Iola in a prairie schooner, made a camp on some vacant land, a few hundred yards south of defendant's abandoned factory site.

Plaintiff Van Britt testified that his younger son spent the night preceding the accident at his (plaintiff's) brother's house, who lived northwest of defendant's land. And that on the day of the accident, he had sent his elder son to fetch him home.

The evidence shows that there is a roadway running through defendant's tract from the northwest to southeast, which was about 120 feet west of the basement. This path or roadway had been made by petitioner's employees and others and was used by people as a short cut. From this path the basement and its contents were not visible. This is the only path or roadway shown by the evidence.

On the afternoon of the day of the accident a group of four boys were passed travelling along this

path going in a southeasterly direction by several witnesses, who were going in the opposite direction. These boys when encountered were then about a block and a half north of the basement. A short time afterwards, these witnesses heard calls for help from the direction of the basement and on going to the rescue, they were told by two little boys who were crying, that their companions were in the water. Ernest Dalton, (R. 31) a witness produced by plaintiff, upon arrival at scene saw a boy going down and rescued him. This proved to be Allen Britt, the elder son, who lived till the following day and died from gastro-intestinal irritation of the stomach and bowels. The younger son Edward was dead before his body was recovered. The rescuers who could swim and remained in the water, some of them for 15 minutes, and who dove repeatedly suffered only slight irritations of the skin and mucous linings, which were temporary and caused no permanent injury.

There was no testimony to explain just how the boys met their death. No witnesses were produced to show their entry into the water. They were naked and evidently had entered the water for a bath. The water until the inner pit was reached (which was a rectangle 38 feet by 14 feet lying in the middle of the basement which was a rectangle 96 feet by 40 feet), was only 2 feet deep for a considerable distance and until the inner rectangular pit was

reached when the depth suddenly increased to about 7 feet.

The testimony of the rescuers was that they felt a burning sensation as soon as they entered the water. (R. 32, 38, 55) Van Britt, their father and one of the plaintiffs, testified that the boys could swim, but the facts themselves seem to contradict this testimony.

The death of Allen Britt from intestinal irritation after his rescue from drowning, and the testimony of experts, proved that the water in the basement was contaminated by chemicals. The evidence as to how the contamination was caused, was conflicting. The testimony shows that during the time the plant was in operation, no sulphuric acid was permitted to escape. The evidence regarding the condition in which defendant left the premises when abandoned, January 1, 1911, is conflicting.

One of plaintiff's witnesses testified that when the lead pipes were removed from the tower building probably a hundred to one hundred and fifty barrels of acid drained into the pit; another testified that sulphuric acid in cakes (?) was dumped into the pit to an amount he estimated at 150 barrels. (R. 20, 83-84). Sulphuric acid is a liquid. Century Dictionary. And is never handled in wooden containers. (R. 113). On the other hand defendant's Superintendent no longer in its employ but who was in charge of the wrecking, testified that he caused the workmen to dump into the pit 3

or 4 barrels of air slacked lime for the purpose of absorbing what little acid was spilled during the dismantling of the pipe lines so that the men could walk around and not burn their shoes; that sulphuric acid was then worth \$10 per ton and that a barrel would hold 800 pounds and was worth \$4. (R. 113) There was also evidence that during the operation of the plant the only waste came from the nitric acid room, that this residue, was like soft soap when hauled out and until it caked, and that after it was caked it was hauled to the north end of the lot about 425 feet northwest of the tower building. That this was soluble in water and during the operation of the factory, a ditch had been dug to carry away the surface water which came in contact with this refuse. That the stuff that would run down this drain was, light colored, milky like color. There was also evidence that if this drain became stuffed up, the surface water would be diverted so as to flow into the basement. (63) There was a substantial fence about petitioner's tract at the time the plant was removed, but this had entirely disappeared at the time of the accident. (118).

No evidence was offered to show that any children had ever been seen on petitioner's land prior to the accident, and plaintiffs allege that they and their children were strangers in the locality. R. 5.

The testimony as to the appearance of the water in the basement was conflicting. Some testified that it was greasy, and was littered with refuse and

discolored. Others that it was clear and looked like ordinary water. (R. 44-45-47-57).

Plaintiffs allege in their petition that the contents of the pool were so deadly as to cause the instant death of one entering it.

The following testimony of witnesses produced by plaintiffs show that they entered this water, remained in it from 5 to 15 minutes, dove repeatedly, got it in their eyes and mouth and yet sustained nothing but slight injuries, none of which were permanent. All these witnesses, however, demonstrated that they knew how to swim.

Ernest Dalton, a witness produced by plaintiffs, rescued Allen Britt; was in the water not more than 5 minutes, he guessed. (R. 30). Had his mouth open when he went under and it strangled him, so that he had all that he could do to rescue one boy. His eyes smarted, the end of his tongue blistered and his body burned. Mouth smarted as though he had eaten an Indian turnip (R. 28). No permanent ill effects.

Jake Lee (R. 32), a witness produced by plaintiffs, was in the water 15 minutes or more (R. 33) and dove 5 or 6 times (R. 35). The water hurt his eyes and his lips peeled. Had no effect upon his body (R. 33). His eyes burned 3 or 4 days but didn't notice lips after an hour. (R. 35).

Arthur Burnett (R. 48), a witness produced by plaintiffs, was in the water 3 or 4 minutes probably (R. 49). Went into the pool a little way—about a

foot—the water burned and stung. The sensation ceased when he washed his feet. (R. 49, 55).

No attempt was made by plaintiffs to prove that defendant had any actual knowledge of the condition in which the basement was at the time of the accident, or at any time.

At the conclusion of the testimony the trial judge, after refusing all petitioner's requests to charge, charged the jury orally as follows:

“CHARGE OF THE COURT.

(Pollock, J.):

Gentlemen of the jury, again in the trial of this case, we have reached that place where it becomes the duty of the court to charge you as to the law which shall govern you in your deliberations upon a verdict in the case. In your presence, and your body constituted very nearly as it is now, I have heretofore endeavored to give you my conception of the duty of the jury and the court in cases tried as this one is being tried, to a jury and the court. In brief substance it is this: That the court, and the court alone, is the exclusive judge of the law of the case; the jury must take the law precisely as declared by the court. On the other hand, the jury, and the jury alone, is the exclusive judge of the weight of the evidence, the credibility of the witnesses and the facts proven on the trial of the case.

Gentlemen of the jury, bearing in mind the respective duties of your body, and the court, both as instrumentalities created by the law for the purpose of doing justice in our courts, I will proceed to define

to you, as I understand it, what the issue is that is to be determined by your verdict in this case.

This is an action brought by Mr. and Mrs. Britt, who state they are and were at the time of the commencement of this action, or, at least were at the commencement of this action, citizens and residents of the State of Missouri, against the United Zinc and Chemical Company to recover damages from the defendant for the tragic death of their two boys, Edward Britt and Allen Britt, said to have been of the ages of eight and ten or eight and eleven years. That is, they charge the death of their children was occasioned by the wrongful act of the defendant in this case. The petition is in two counts, the first being a cause of action for the death of Edward, the older of the two boys; the second, being an action to recover the damages they have sustained for the death of their younger boy Allen. This is brought under a statute of this state allowing an action to be brought under the circumstances of this case by the plaintiffs. That the father and mother of these children, if citizens and residents of the state of Missouri, under this statute, "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

There is another section that provides that if these children were citizens and residents of the state of Missouri at the time they lost their lives, these parents residing there might bring it not in their representative but personal capacity.

The cause of action set forth here by the plaintiffs is this:

That this defendant had been for many years, operating a smelter and acid or chemical plant near the city of Iola; that this plant was dismantled by the defendant. I believe, in the latter part of the year 1910, that is, the buildings were torn down and removed. But it is charged by plaintiffs in this case that after the defendant had torn down and removed its buildings and machinery from this plant that it still continued to own the land on which this plant had been theretofore located. That the defendant allowed to be collected and stand there on these grounds a pool of water which in appearance was fresh, clear and healthful for any one to go bathing in, but, in truth and in fact, that the water in this pool, which was, under the evidence in this case, the basement of a building that had stood there in which the work of the defendant had been conducted, was impregnated with poisonous substances alleged in this petition to be a caustic potash, sulphuric acid and other deadly poisons, and that this pool was left there by the defendant wholly unprotected and in this condition, and either known to be so by the defendant, or so maintained, or by the use of ordinary prudence and caution they should have known of the deadly and dangerous character of this pool so standing there on these premises in the month of July 1916. That the plaintiffs in this

case, Mr. and Mrs. Van Britt, with their children, were traveling through the city of Iola; that they camped near this pool of water; that because of the season of the year, the day being hot, which is alleged to have been the 27th day of July, I believe, 1916, this pond of apparently clear and pure and fresh water, and healthful for bathing, attracted these children of tender years, and immature knowledge, to the pond. That the younger child first went into the pond to bathe, was overcome by the deadly poisons contained in this water and perished; that the older child, Edward, endeavoring to save the life of his little brother, plunged into the pool and he was overcome by reason of the poisonous character of the water in this pool, and although he was taken out and lived for the space of a day, or about that, thereafter, that because of the deadly and dangerous character of this pool that was so left there by the defendant, wholly unprotected from the invasion of these children, that he died, and this action is brought by the plaintiffs to recover the pecuniary loss they have sustained by reason of the tragic death of these little boys.

The defendant had a perfect right to construct and operate a chemical plant of this kind on these premises; had a perfect right to cease operating the plant and to abandon it, move it away. The plaintiffs in this case, said to be by the evidence here, citizens of the state of Missouri, had a perfect right to travel in a wagon, or any other way they saw fit; and the fact, I may say here gentlemen, that the plaintiffs were citizens of Missouri, traveling about the country in a covered wagon, in no manner affects their standing before this court or the right to recover if under the laws they are entitled to

recover, and under the facts of this case, any more than if they had been citizens engaged in a different employment; and no more should the defendant, because of its corporate capacity, be charged with a cent or a dollar here than if they were persons of precisely the same standing as the plaintiffs in the case. We lay those matters entirely out of the consideration and we view merely the rights of the parties under the facts and under the law.

It is true, if the deceased in this case had been persons of mature years and gone upon these premises they would have been trespassers in law and the defendant would have been liable to them in case of accident or death to their representatives only for willful or wanton negligence. Now the law does look in a different manner toward infant children of immature years and having no experience in life and of less knowledge. The law does not hold them to the strict accountability as trespassers that it does adult persons.

The burden of proof is on the plaintiffs in this case. They must prove in this case by the greater weight of all the credible evidence, what? They must prove that this pond that had been allowed to accumulate here on the premises of this defendant was in the first place, by reason of the sulphuric acid or other poisonous substances which the defendant had left there allowed to accumulate with the water in this basement into a poisonous pool such as was highly dangerous to life. In the second place, they must prove that this pond, left there as it was, thus impregnated with a deadly poison, on account of the fact of its apparent purity, apparent clearness and so on, was alluring to these children at a time in the

years such as the 27th day of July would be in this country to go in bathing. And that the children, having seen this pond, being attracted to it on account of the season of the year and a child's natural desire, if there be such a natural desire, in your judgment, to go in bathing on a hot or warm day in a clear and healthful looking pool. If the plaintiffs have established these facts by the greater weight of all the credible evidence, that is, if you believe from all the creditable evidence this pool was impregnated with these poisonous substances which were highly dangerous to life, and were allowed to accumulate there, and remain there on these premises by the defendant, on its property, wholly unguarded and unprotected, and it was either known to be in such condition by the defendant, or, by the use of reasonable prudence the defendant should have known this fact, and you further believe from the greater weight of all the credible evidence in the case the children were, on account of the appearance of this pond or basement full of water, allowed to stand there in that shape, apparently clear and healthful but in fact deadly poisonous and thus they were allured to it and went in bathing, then the defendant in this case is liable to the plaintiffs.

There has been here the question of the knowledge of the defendant as to the condition there. The law on that matter is this: The defendant did know the business in which it was engaged here when it was conducting this chemical plant. The defendant did know, or at least is conclusively presumed to know, whether the products that were there manufactured and the agencies that were employed in this manufacture were or were not poisonous and dangerous to human life. It is presumed

to have known that because it is the business in which it was engaged. If the defendants left in the basement of this building from which it tore the building away these substances which were poisonous, and known to be, and left this basement unprotected so that if the water should fall or run unto it in the natural course of nature and thus reach these poisonous substances, then the defendant would be presumed to know the result of this basement filling up with water and these poisonous substances. Or, if the defendant left knowingly about its plant there which it had abandoned, poisonous substances, such as it would know it was manufacturing there, in such proximity to the basement that the operation of the elements would take up and carry them into this pond in the natural course of events, and went off and left it wholly unguarded from approach by those who, like the children, might be allured to it, then it would be charged with knowledge as to what would naturally result from such a condition. So the question here is not altogether what the defendant did know, but it is what the defendant would be presumed to know, because the defendant would be presumed to know the natural and probable result of its own acts.

On the other hand, suppose these children were, so far as this case is concerned, attracted there or allured there by this pond or basement full of water and did go in bathing in the water. If this pond or basement of water was not impregnated with sulphuric acid, caustic potash or other deadly substances, so that they were overcome by the water being poisoned; that is to say, if they went in bathing there and it was not on account of the poisoned condition of the water they lost their lives, but by drowning,

the defendant in this case is not liable. As far as this case is concerned, in such event, the fault would not lie with the defendant, because one has a perfect right to maintain upon his premises a pond of water and if others are allured to that and attempt to use it, they would not be liable because a pond of water is not a highly dangerous agency such as this pond is alleged to have been. But the defendant in this case can be liable only in the event you find from the greater weight of all the credible evidence in the case that the premises, including this basement of water, or pond of water, as left there, was in its nature, and in its looks, on a day in July such as would be the 27th day of July in this country, both highly poisonous and alluring to the children, and if you further believe from the greater weight of all the credible evidence in the case that they lost their lives because of the fact that the pond was impregnated with this poisonous substance, of which the defendant either knew, or, by the exercise of ordinary prudence and caution for the protection of its property against a deadly or poisonous agency they would have had to have known. Gentlemen of the jury, in this case, if you believe, as claimed here by the plaintiff, and believe it by the greater weight of all the credible evidence that this pond was poisoned, so that it was dangerous to the life of these children who you believe from the evidence could have protected themselves if it had been healthful water, and would have protected themselves in healthful water, but you further believe it was by reason of the poison in the water highly dangerous to them, and this danger was unknown to them, and if they were allured there to go in bathing believing it to be healthful water in which to bathe, but on ac-

count of its deadly poison they lost their lives, and the defendant left the poisonous substance there in this basement, or where the natural working of the elements would carry it into and poison this pool, then, in that event, you will find for the plaintiffs.

But if the plaintiffs have failed to prove any of these conditions which they must prove on their part by the greater weight of all the credible evidence in the case, your verdict will be for the defendant on each of the counts.

In the event you find for the plaintiff how will you measure their recovery? These actions are brought to recover the pecuniary loss which the plaintiffs have suffered, as they say, from the death of their children by the wrongful act of the defendant, and there can be considered in cases of this character, and in this case, only the pecuniary loss suffered, if any. You cannot consider in this case the suffering these children underwent, if any. That was lost by the death of the children, it was their suffering, and was lost, and it is gone forever by their deaths. Neither can you consider in this case the parental feeling, the anguish that parents would suffer from a double tragedy of this kind occurring to their children. All you can consider in the event you find for the plaintiffs will be, as I say, the pecuniary loss. That is to say, what these parents had the right to reasonably expect they would profit by the continued living of their children, of the ages that they were, with their qualifications, physical and mental, in so far as shown by the evidence, and that to be measured by you gentlemen, in the event you find for the plaintiffs, in dollars and cents, taking into consideration, of course, the age of the par-

ents as you view that from whatever evidence there is in the case, the ages of the children, the expense they would be to, and again the material benefit or profit these children would have been to these parents if they had not perished but had continued to live out their allotted time.

Now, as I have said to you, you are the exclusive judges of the weight of the evidence, the credibility of the witnesses, the facts proven in the case. In considering this matter you will determine these propositions that I have submitted to you. And again I say, before the plaintiffs can recover in this case they must establish that this pool of water standing there and maintained by the defendant on its property was apparently clear, bright, healthful, but that appearances were deceitful, that in fact it was impregnated with these deadly poisons to such an extent that the children attempting to go in swimming in this pond were not drowned but by reason of the effect of these poisonous substances on them their lives were taken. That the condition of the pond was such that it would be alluring and attractive at the time of year and under the conditions which these children were there, and further, that the defendant knew the condition of these premises or by the exercise of reasonable prudence and caution it should have known that its premises instead of being safe in this respect as to poison, that the waters were poisoned in this kind of a deadly manner. If the plaintiffs have proven those matters, they are entitled to recover, if not, your verdicts will be for the defendant. And if you come to a verdict for the plaintiff you will estimate the pecuniary loss that they have suffered and return it in your verdict measured in dollars and cents.

Mr. Ashley: Your Honor, we desire to note an exception to the charge of the court, particularly to the matter of allurements, in view of the fact that there is no evidence that the water in the place could be seen from off the premises, and that the allurements must be before the children, (who, if mature would be trespassers) come upon the premises.

The Court: I know you have that thought running through your minds from your requests to charge.

Gentlemen of the jury, I believe the law to be this:

That the law excuses a child of immature years from the same obligation in regard to trespassing on others property that it does an adult. The adult knows more about property lines, property rights, than does the immature child. And if these children, being camped there with their parents were attracted onto these premises, *although they may not have seen this pool when they were off the premises, yet, if anything, curiosity, or otherwise, brought them upon the premises of the defendant, and then they saw this pool, and on account of the weather, its apparent healthfulness and condition was attractive to these children to go in bathing, and they were thus allured to enter the pond*, but still, if the pond was of the character charged here by the plaintiffs in this case, and they thus lost their lives, the defendant would be liable if it knew this pool was standing there thus poisoned, or if by the exercise of reasonable caution and prudence in the maintenance of its property it should have so known; that is to say; if it knew it left there these poisonous substances, which mixed with this water would become

impregnated in this pond, still, in such event, although the children may not have seen this pond from the highway, the defendant would be liable if the pond was left by defendant wholly unguarded.

Now, Mr. Ashley, I have brought out your point specifically and directly, now if you will except to that.

Mr. Ashley: Yes, we desire to except to that.

Mr. McClain: We also wish to except to the charge of the court on the ground, in the consideration of pecuniary benefit as to these minors, it should be limited to the time they reach their majority.

The Court: Now, gentlemen, in regard to that. Of course the parents of children are entitled to receive whatever they may earn until the child reaches its majority, which, in the case of a boy child is the age of twenty-one years, and what is customary and usual is the guide here. It would be reasonably thought when these boys reached mature age they would then take upon themselves the obligations men generally do and have a family of their own, but until they arrive at the age of twenty-one years, their earnings, whatever they would be, and also the care, the efforts they would bestow in taking care of their parents, would go to make up the reasonable pecuniary value they might naturally expect to receive from their children.

Mr. Ashley: If the Court will pardon me, in your charge to the jury your Honor said, that you thought we might be liable for the action of nature, the elements, in bringing to this place poisonous substances. If it were a hidden danger—it seems to us there would have to be willful—

The Court: No, I say this: If you left there on your premises poisonous substances, which, by leaving the basement here, the building torn down, the roof torn off, etc., and which the elements would naturally gather up and deposit in this basin, I say if you knowingly left such poisonous substances there on your premises, which the natural operation of weather or water would gather up and deposit in this basin, you would be presumed to know the condition as it existed.

Mr. Ashley: We would like to save our exception to that.

The Court: All right."

ASSIGNMENTS OF ERROR.

The District Court erred:

I.

In not directing the jury to find for defendant at close of all the testimony. See Assignment IV. (R. 150).

II.

The said District court erred in that part of its charge to the jury, in which it said, to-wit:

“Gentlemen of the jury, I believe the law to be this:

That the law excuses a child of immature years from the same obligation in regard to trespassing on others property that it does an adult. The adult knows more about property lines, property rights, than does the immature child. And if these children, being camped there with their parents were attracted onto these premises, although they may not have seen this pool when they were off the premises, *yet if anything, curiosity, or otherwise, brought them upon the premises of the defendant*, and they saw this pool, and on account of the weather, its apparent healthfulness and condition was attractive to these children to go in bathing, and they were thus allured to enter the pond, but still, if the pond was of the character charged here by the plaintiffs in this case, and they thus lost their lives, the defendant would be liable if it knew this pool was standing there thus poisoned, or, if by the exercise of reasonable caution and prudence in the maintenance of its property it should have known; that is

to say, if it knew it left there these poisonous substances, which mixed with this water would become impregnated in this pond, still, in such event, although the children may not have seen this pond from the highway, the defendant would be liable if the pond was left by defendant wholly unguarded."

See Assignment VII (R. 151)

III.

The said District court erred in that part of its charge to the jury in which it said, to-wit:

"Gentlemen of the jury, in this case, if you believe, as claimed here by the plaintiffs, and believe it by the greater weight of all the credible evidence that this pond was poisoned, so that it was dangerous to the life of those children who you believe from the evidence could have protected themselves if it had been healthful water, and would have protected themselves in healthful water, but you further believe it was by reason of the poison in the water highly dangerous to them, and this danger was unknown to them, *and if they were allured there to go in bathing*, believing it to be healthful water in which to bathe, but on account of its deadly poison they lost their lives, and the defendant left the poisonous substance there in this basement, *or where the natural working of the elements would carry it into and poison this pool*, then, in that event, you will find for the plaintiffs.

See Assignment XIV (R. 153)

IV.

The said District court erred in refusing to give the special charge tendered by the defendant, to-wit:

"The court charges the jury that they must find for the defendant if they believe from the evidence that neither of the sons of plaintiffs saw the water standing in the basement of the old tower building until they had gotten upon the private property belonging to the defendant; provided said boys came upon such property without the knowledge or invitation of defendant, or of any of its officers, agents or employees."

See Assignment VIII (R. 152).

V.

The said District court erred in refusing to give the special charge tendered by the defendant, to-wit:

"The court instructs the jury that if they believe from the evidence the boys Edward and Allen Britt on or about the afternoon of July 28, 1916, entered the premises of defendant without the knowledge of defendant and without any leave, license or invitation, and without any allurements exerted upon them before their entrance upon defendant's land, they were trespassers and defendant owed them no duty except to abstain from wilfully injuring them, and unless they find the defendant intended to injure them their verdict will be for the defendant."

See Assignment XI (R. 152).

VI.

The said District court erred in that part of its charge to the jury which it gave by way of recapitulation so that counsel could specifically object thereto.

“Gentlemen of the jury, I believe the law to be this:

That the law excuses a child of immature years from the same obligation in regard to trespassing on others property that it does an adult. The adult knows more about property lines, property rights, than does the immature child. And if these children, being camped there with their parents were attracted onto these premises, although they may not have seen this pool when they were off the premises, yet, if anything, curiosity, or otherwise, brought them upon the premises of the defendant, and then they saw this pool, and on account of the weather, its apparent healthfulness and condition was attractive to these children to go in bathing, and they were thus allured to enter the pond, but still, if the pond was of the character charged here by the plaintiffs in this case, and they thus lost their lives, the defendant would be liable if it knew this pool was standing there thus poisoned, or, if by the exercise of reasonable caution and prudence in the maintenance of its property it should have so known; that is to say, if it knew it left there these poisonous substances, which mixed with this water would become impregnated in this pond, still, in such event, although the children may not have seen this pond from the highway, the defendant would be liable if the pond was left by defendant wholly unguarded.”
(R. 135)

SPECIFICATIONS OF ERROR COMMITTED BY THE CIRCUIT
COURT OF APPEALS.

The Circuit Court of Appeals erred:

I.

Because it approved the charge of the District Judge in its entirety overruling all requests to charge made by plaintiff in error. (R. 193-197)

II.

Because said Circuit Court of Appeals erred specially in approving that part of the trial court's charge which told the jury "That it was *immaterial* whether the children of defendants in error *saw or could see the pool before* they entered upon the tract of plaintiff in error." (R. 193-197)

III.

Because the Circuit Court of Appeals assumed that the case at bar was governed by the principle (i. e. maxim) *sic utere tuo* etc. because the dangerous attraction on its premises was put to *no useful, ornamental or other purposes of enjoyment*. (R. 193-197)

IV.

Because contrary to the record the Circuit Court of Appeals, mistakenly assumes "That the undisputed fact was that the public passed over said

premises at will, so much as to beat foot paths across it; and the further fact of its nearness to the homes of families." (R. 193-197)

V.

Because the decision of said Circuit Court of Appeals "That children of tender years under no circumstances are classed with idlers, *licensees* or trespassers is contrary to the former decisions of said court and of many Federal Courts of other circuits and against the weight of authority in the courts of the United States. (R. 193-197)

VI.

Because said Circuit Court of Appeals in answer to plaintiff in error's contention "That the record contained no proof of knowledge on the part of the owner that its tract of land was being used or visited, by the public or by children, and that if the evidence shows such user or visitations they were wholly without invitation or consent," replies that on the facts adduced the *law imputes both knowledge and consent*. (R. 193-197)

BRIEF AND ARGUMENT.

The question in this case is whether a corporation owning a large tract of land on the outskirts of a small town, which it has ceased using for many years, must at its peril, not only keep said premises in such condition that they shall be free from danger to such children as shall enter thereon without its knowledge, or invitation express or implied; but must have nothing on said premises that such children can turn into a source of peril by making a use thereof never within the owner's contemplation.

The theory upon which the trial court submitted the case to the jury was that the children of plaintiffs could not be trespassers by reason of their immaturity, and that defendant should not only have anticipated their presence on its land, but owed them the duty to keep its land free from latent dangers, (even though defendant had no knowledge that any such danger existed), since its former use of said land had been such that *in the light of subsequent events it should have anticipated that what happened was possible to happen.*

The Circuit Court of Appeals in its opinion 264 Fed. 787 while admitting that the case brought before it on appeal was a *debatable* one, gave as its reasons for sustaining the trial court; (1, 2)

(a) That the case came within the principle *sic utere tuo* etc. because the *dangerous attraction*

was put by its owner to no useful, ornamental or other purpose of enjoyment.

(b) That the trial court was right in telling the jury it was immaterial whether the boys saw it (the cellar filled with water) *before* they went upon the land, or *after* they were on it, because the public passed over it at will, so much so as to beat foot paths across it; and the further fact of its *nearness* to the *homes of families* and

(c) The principle of law applied in cases like the one before the court, that children of tender years are not classed with idlers, licensees or trespassers, citing in support of this last reason.

2 Shearman & Redfield on Negligence, Sec. 705;
City of Pekin v. McMahon, 154 Ill. 141
 which we will discuss later.

(d) That even if the evidence failed to show, as plaintiff in error claimed: that there was no proof of knowledge on the part of the owner; that the tract was being used or visited by children; or if such visits by the public or children were wholly without its invitation or consent, it was immaterial since from the facts adduced, the law would impute both knowledge and consent.

Citing

Union Pac. Ry. Co. v. McDonald, 152 U. S. 262;

Nor. Pac. Ry. Co. v. Curtz, 196 Fed. 367;

Lumber Co. v. Thompson, 215 Fed. 8;

Chesko v. Del. & Hud. Co., 218 Fed. 804;

Snare & Triest Co. v. Friedman, 169 Fed. 1;

Roman v. Leavenworth, 133 Pac. 551, 90
Kan. 379; 148 Pac. 746;

Kansas City v. Liese, 80 Pac. 626; 71 Kan.
283.

Light & Power Co. v. Healy, 70 Pac. 880, 65
Kan. 798.

These reasons contained in the Court's opinion, which for convenience of reference we have classified as (a), (b), (c) and (d), we will take up in the order named.

(a) The maxim *sic utere tuo ut alienum non laedas* is not a legal principle which can be of use in the solution of difficult legal propositions but is a moral precept, which as Mr. Justice Holmes aptly says, "Teaches nothing but a benevolent yearning."

8 Harvard Law Review 3;

and according to Prof. Terry, "Belongs to the class of extra-legal principles—which we may call legislative, because they serve as guides to show how the law ought to be made."

Terry's Leading Principles of Anglo American Law, Sections 10, 11.

This maxim according to Erle, J., "Is mere verbiage, a party may damage the property of another when the law permits; and it may not where the law prohibits: So that the maxim can never be applied till the law is ascertained; and when it is, the maxim is superfluous."

Bonomi v. Backhouse, 96 E. C. L. 641.

See also the Use of Maxims in Jurisprudence, 8 Harvard Law Review, 13.

“The maxim that a man must use his property so as not to incommode his neighbors, only applies to neighbors who do not interfere with or enter upon it.”

Frost v. Eastern Railroad Co., 64 N. H. 220-222.

It refers only to “acts, the effect of which extend beyond the limits of the property.”

Ratte v. Dawson, 50 Minn. 450-453.

Pannill, Admr. of Walker v. Railroad, 105 Va. 226; 4 L. R. A. (N. S.) 80-85.

In *Deane v. Clayton*, 7 Taunton 489, Gibbs, J., said:

“I know it is a rule of law that I must occupy my own so as to do no harm to others but it is their legal rights only that I am bound not to disturb; subject to this qualification I may occupy or use my own as I please. It is the rights and not their security against the consequences of (their) wrongs that I am bound to regard.”

In *Knight v. Albert*, 6 Pa. St. 472, 47 Am. Dec. 478-9, Ch. J. Gibson said: A man must use his property so as not to incommode his neighbors; but the maxim extends only to neighbors who do not, uninvited interfere with it or enter upon it.”

(b) The record shows that the defendant's tract of land was in the outskirts of Iola, Kansas, and consisted of about 20 acres of barren land, littered with debris. It was 1,000 feet wide from East

to West, and 1,200 feet long from North to South, and the cellar ruins in which the children went bathing and met their death, was in the middle of the tract. That there was a path 120 feet West of the cellar running North and South, which had been worn by the defendant's employes, through the tract. It is equally clear from the evidence that from this path the cellar was not visible. (R. 34, 47, 58, 100). The evidence also shows that the boys with their companions entered defendant's tract from the North, and were travelling along this path towards the Southern extremity of the tract on their way to their father's camp which was a few blocks South of defendant's factory site. The children were on this path when last seen before the accident. (R. 40, 45, 52). There is no evidence in the record to show what attracted them to the water-filled abandoned cellar, nor is there any evidence of foot paths leading to the cellar, and it certainly was not near their home, which the record discloses was in Springfield, Missouri. So that the supposition of this learned Court that the trial Court had in mind the "*nearness of this tract to the homes of families and the frequency of foot paths across it,*" is not supported by the record.

One witness, Stockton, testified that he lived about 80 rods from the "pool," and there is no evidence of others living near by. (R. 86).

At the time these premises were abandoned there was a substantial fence about this entire tract;

but during the long period after the factory site was abandoned the fence had disappeared. (R. 118).

At common law which is in force in Kansas, by statutory enactment, there is no obligation on the part of landowners to maintain fences about their land, and there is no statute in Kansas which requires it.

Union Pac. Ry. Co. v. Rollins, 5 Kan. 177.

Owners of unenclosed land are not required to make them safe for trespassing cattle.

Knight v. Albert, 6 Penn St. 472;

Hughes v. Railroad, 66 Mo. 325.

In *Felton v. Aubrey*, 74 Fed. l. c. 356, Judge Lurton delivering the opinion of the Circuit Court of Appeals for the Sixth Circuit in a case where a child was injured while on the defendant's right of way, says:

"Neither is the fact that it (the railway) crossed an open common of any significance in the determination of the legal right of the company to exclude all persons from its right of way. *That it is unfenced is equally unimportant.*"

The fact that there was a path through defendant's land, by which the Britt children entered said tract for their convenience in reaching their father's camp, did not authorize them to stray from this pathway, and if they did, it was at their peril. And the defendant by merely suffering or permitting such voluntary use, came under no obligation that

its premises were either *fit, safe or suitable, or that they would remain so.*

(c) That children of tender years under no circumstances are classed with idlers, licensees or trespassers is contrary to the decision of said Court of Appeals in the Aubrey case *supra*, and also contrary to the decision of said Court of Appeals for the 8th Circuit in *Duree v. Wabash Ry. Co.*, 241 Fed. 454.

In the *Duree* case *supra* a boy aged 11½ years was killed by the derailment of a locomotive on which he was riding without the permission of the defendant company, the Court says: "In determining this question the controlling question is: Was there a *duty* to the plaintiff's intestate which was violated by the defendant? * * * * If there was not there is no *legal liability*."

In answering its own question, the Court says, "We think his relation to the defendant company, whether technically so or not, was in contemplation of law that of an *intruder*, or *trespasser*, and the defendant owed him no *duty* except the negative one, not to maliciously, wantonly, or with gross and reckless carelessness injure him. And the fact that the deceased in the present case was a boy 11½ years old cannot affect, the application of the rule, for the reason that the absence of duty is the same as in the case of an adult, and the consequent absence of liability must be the same in both."

In *Felton v. Aubrey*, 74 Fed. 350 Circuit Court of Appeals for 6th Circuit a child aged 9 years was injured at a place where one of the railroad company's tracks crossed an open common upon a high embankment, 25 feet above the level of the common. This common was crossed in every direction by people residing in the neighborhood. Lurton J., (afterwards Mr. Justice Lurton) in delivering the opinion of the Court says page 355: "But if the boy was wrongfully on the track, or wrongfully attempting to cross where he had no right to cross, then he would be a trespasser and the company was under no legal duty to anticipate trespassers, or to move the trains with reference to the probable presence of such intruders" * * * and at page 359 the same able judge says:

"It may be entirely consistent with sound morals and proper regard for the rights of others that the owner of premises should not be held liable to one who goes upon another's premises for his own uses, and sustains some injury *by reason of the unfitness of the premises for such uses, not subsequently brought about by the active interference of the owner.* If such person goes there by mere sufferance or naked license, it would seem reasonable that he should pick his way, and accept the grace, subject to the risks which pertain to the situation. But, on the other hand, if, with knowledge that such person will avail himself of the license, the owner actively changes the situation by digging a pitfall, or opening a ditch, or obstructing dangerously the premises which he has reason to believe will be tra-

versed by his licensee, sound morals would seem to demand that he should give reasonable warning of the danger to be encountered."

It is also contrary to the recent decision of the Court of Appeals for the 2nd Circuit in *McCarthy v. Railroad*, 240 Fed. 602, which held that "An infant 7 years old killed on defendant's right of way was a trespasser and that his administrator could not recover for his death, the Court saying "Any person who goes upon the premises of another is a trespasser *if* he goes there out of curiosity or for his own purposes, and without invitation, express or implied, and not in performance of a duty to the defendant. A child of tender years may be a trespasser."

Felton v. Aubrey supra was approved and followed by the Circuit Court of Appeals for the 6th Circuit in *Ellsworth v. Metheney*, 104 Fed. 119, Circuit Judge Day (now Associate Justice) delivering the opinion of the Court.

In the case at bar the trial court instructed the jury that on account of the immaturity of the Britt boys, "*if anything, curiosity or otherwise, brought them upon the premises of defendant, and then they saw this pool and on account of the weather and its apparent healthfulness * * * they were allured to enter the pond, * * * if the pond was of the character charged by plaintiffs, (i. e., contained poisonous ingredients) and they lost their lives, the defendant would be liable * * * .*"

The decision that a child cannot be a trespasser because of his immaturity is also contrary to the decision of the Court of Appeals for the 4th Circuit in *Hastings v. Railroad*, 143 Fed. 260, where a boy 8 years old was held to be a trespasser because he was on the defendant's premises without the invitation of defendant, and solely for his own convenience. The Court *arguendo* says p. 263: "Was the boy a trespasser? He was not there for the purpose of transacting any business with, or at the invitation of the defendant company, but solely for his own convenience. He had left the highway crossing and was some 50 feet therefrom, not on business, but for the purpose of crossing to go to an orchard, without the knowledge of, or at the instance of, the defendant."

It is also contrary to a recent decision of the Court of Appeals for the 2nd Circuit in *Heller v. Railroad*, 265 Fed. 192, where a child 11 years old was injured by coming into contact with a high power electric feed wire which was attached to the abutments of a public roadway bridge over defendant's tracks where it operated its train by electricity. The boy climbed one of the abutments holding in his hands a tin can and upon touching the feed wire was electrocuted. The Court said "plaintiff's intestate was on the defendant's property as a trespasser, unless circumstances hereinafter mentioned, must be regarded as an invitation to enter. A child even of tender years may be a trespasser." * * *

"The mere fact that a *trespasser is a child* does not create or impose on the owner any duty to keep his premises safe, at least where there is nothing about the premises which is attractive to children. *The only duty in such a case is that of avoiding willful or wanton injury.*"

This same Court in the subsequent case of New York, *N. H. & H. R. Co. v. Fruchter*, 271 Fed. 419, where the facts were very similar, held that the question of negligence was for the jury. This latter case was removed to this Court by writ of certiorari granted April 11, 1921, presumably because of its inconsistency with the Heller case *supra*.

It is also inconsistent with the recent decision of said Circuit Court of the 8th Circuit, to the effect that there must be a reasonable expectation of the presence of children at the time and place of danger before there arises a duty to guard them from danger.

Hardy v. Railroad, 266 Fed. 860.

The extract from *City of Pekin v. McMahon*, 154 Ill. 141, to-wit that:

"Although a child of tender years, who meets with an injury upon the premises of a private owner, may be a technical trespasser, yet the owner may be liable, if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to the child, appealing to its childish curiosity and instincts. Unguarded premises which are thus supplied with dangerous attrac-

tions, are regarded as holding out implied invitations to such children," which said Court of Appeals quotes, to be understood, must be interpreted according to the facts of said case which are as follows: Vacant lots owned by the city were in a thickly settled part of the city. They had originally contained a water course, which the city deepened into a pit by removing sand. This pit filled with water and boys were accustomed to play there upon floating planks. The city had been notified of its dangerous character by parents who requested its removal; in spite of which this condition had continued for more than a year prior to the accident; and besides there was a city ordinance declaring such a water filled excavation a nuisance. Upon these facts the Court said:

"Where the land of a private owner is in a thickly settled city, adjacent to a public street or alley, and he has upon it, or suffers to be upon it, dangerous machinery, or a dangerous pit, or pond of water, or any other dangerous agency, at a point thereon near such public street or alley, of such a character as to be attractive to children of tender years incapable of exercising ordinary care, *and he is aware or has notice of its attractions for children of that class* we think he is under obligations to use reasonable care to protect them from injury when coming upon said premises, even though they may be technical trespassers. To charge him with such obligations under such circumstances is merely to apply the well known maxim, *sic utere tuo ut alienum non laedas.*"

Subsequently the Supreme Court of Illinois in *McDermott v. Burke*, 256 Ill. 401 while approving *City of Pekin v. McMahon supra*, adds the following limitation thereto;

"It is a necessary element of the liability that the thing which causes the injury is tempting to children and to constitute a means of attracting them upon the premises, which the owner should anticipate. *The dangerous thing must be so located as to attract them from the street or some public place where they must be expected to be.* An owner would not be liable if he maintained something for his own use which might be dangerous, but which would only be found by children going upon his premise as trespassers."

See also *Fincher v. Railroad Co.*, 78 S. 433; 143 La. 163;

Elliott on Railroads 2nd Ed. Sec. 1259 p. 617.

It was upon *McDermott v. Burke supra* and other similar cases, that defendant based its 5th request to the trial court to charge, to-wit,

"5. The Court charges the jury that they must find for the defendant if they believe from the evidence that neither of the sons of plaintiffs saw the water standing in the basement of the old tower building, until they had gotten upon the private property belonging to the defendant; provided said boys came upon said property without the knowledge or invitation of defendant or any of its officers, agents or employees" (R. 145).

2  Shearman & Redfield Sec. 705 also cited by

the Court of Appeals to sustain that clause in the trial court's charge "that children of tender years are not classed with idlers, licensees or trespassers" expressly limits the application of these words by the connection in which they are used as follows: "*The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in safe condition, for they being without judgment and likely to be drawn by childish curiosity into place of danger, are not to be classed with trespassers. And yet merely allowing children to play upon a vacant lot is held not to amount to an invitation which creates liability for its condition.*"

(d) The Court of Appeals in reply to plaintiff in error's contention "that there was lack of proof of knowledge on the part of the owner that the tract was being used or visited by the public or by children, and that if the evidence shows such use or visitation they are wholly without invitation or consent," says "on the facts adduced the law imputes both knowledge and counsel," and quotes in support thereof the following extract from *Northern Pacific Ry. Co. v. Curtz*, 196 Fed. 367; 116 C. C. A. 403:

"The occupant or owner of premises who invites, either expressly or impliedly, others to come upon them, owes them the duty of using reasonable and ordinary diligence to the end that they be not necessarily or unreasonably exposed to danger; and an implied invitation to

another to enter upon or occupy premises arises from the conduct of the parties, and from the owner's knowledge, actual or implied, that the general use of his premises has given rise to the belief on the part of the users thereof that he consents thereto."

This extract like the one from the Pekin case *supra* must be read in the light of the facts in that case which are as follows:

The injury occurred not on the private property of the plaintiff in error, but upon a public street of the City of Tacoma, where it was the custom of the railroad company for many years to store its empty wheat cars. Prior to the accident, men, boys and girls daily and openly and with the knowledge of the railroad employes, went into such empty cars to sweep up and gather loose wheat. There was evidence that the switchmen frequently told boys where wheat could be found in the cars, and there was testimony that, but a few minutes before the injury complained of, a switchman directed the defendant in error to the cars in one of which the defendant in error was sweeping wheat at the time of the injury. There was also evidence to show that the company itself knew that the children were in the custom of sweeping the wheat in these cars.

Under these circumstances the Court held that there having been proof to go to the jury to show that the defendant in error was a *licensee* and *not a trespasser* it was a question for the jury to deter-

mine whether the Railroad Company was negligent in bumping these wheat cars with a locomotive and other freight cars so violently, as to throw the plaintiff out of the car and under the wheels of the train.

These undisputed facts show that the defendant railway company had *actual knowledge* that men, women and children visited these empty wheat cars daily to glean the wheat scattered upon the car floors, and that they were expressly invited to do so by the company's switchmen. We therefore respectfully suggest that what is said by the court in the Curtz case in the paragraph excerpted about "*imputed knowledge*" and "*implied invitation*" is the *purest dicta* when applied, to the facts in the Curtz case, and that the Curtz case can be no authority in the case at bar, where the evidence shows that the plaintiff in error was absolutely without *actual knowledge*, that there existed on its premises anything that could portend danger to anybody; and where there was no evidence that any children ever before visited its premises; and where the defendant in error's children lived in another state and had never been on the premises before the day of the accident.

3. In conclusion the Court of Appeals cites in support of its decision in sustaining the trial court in submitting the case to the jury upon the instructions given and refused, the following cases which we shall review briefly in the order cited by said

court and attempt to show that they are easily distinguishable from the case at bar:

McDonald v. U. P. Ry. Co., 152 U. S. 262;

38 L-ed 434. This case was really decided on the ground that defendant had failed to fence its slack pile as required by the statute of Colorado. This is apparent from the fact that when the case was first brought before Judge Brewer, afterwards Associate Justice of this court, at Circuit (See *McDonald v. U. P. Ry. Co.*, 35 Fed. 38), he sustained a demurrer on the ground that the facts did not bring it within the ruling of the *Stout* case, Judge Brewer saying:

“An attempt has been made to bring it within the rule laid down by the Supreme Court in the *Stout* case, 17 Wall., 657, where a railroad company left a turntable insecure and unfastened, and boys came around it, and playing with it, one of them was injured; and it was held that there was a question of fact which must be submitted to a jury as to whether there was or was not negligence in thus leaving the turntable on its own ground insecure. There was one significant fact in that which all men must take notice of, and that is a temptation which anything of that kind is to boys. They are attracted by such an instrument; like to see it turn; like to ride on it. The railroad company, like everybody else, must take notice that such an instrument as that is a temptation, and likely to attract boys of tender years, who are ignorant of the dangers that surround it. But

what temptation is there in a pile of ashes? Would anybody anticipate that a boy, even of tender years, would be attracted by a pile of ashes, an ash heap of any shape? It is true, this boy, frightened by others, and fleeing, ran across it, or attempted to run across. So he would if there had been a pile of manure, instead of ashes, or anything else which did not on its face warn him of danger, or discourage him from attempting to cross. Assuredly no individual would anticipate, or could be expected to anticipate, that there was anything in a pile of ashes any more than a manure heap which would attract boys and lead them to play about it, or get into trouble from it. A person who, without business or invitation or permission, goes onto the ground of another, is a trespasser. One that thus went on the mining property was a trespasser."

The second time this case was brought (in June, 1890), See 42 Fed. 579, the statute of Colorado was pleaded and Judge Caldwell stated that without the statute it was a doubtful question as to whether the defendant had been guilty of any negligence.

Even if this case was in point, it appears from the Court's opinion, that the railway company had had actual knowledge for two years of the existence of the slack pit and of its dangerous condition and that children were allowed to go around the machinery where the shaft was.

Mr. Justice Harlan further commenting on Judge Caldwell's charge 42 Fed. 579, says:

"The Court correctly said that there was no controversy about the leading facts of the case, and that the defendant was guilty of negligence. As the facts were undisputed the question of liability upon the ground of negligence by the railroad company which was the primary, substantial cause of the injury complained of, it was not error in the court to so declare."

Lumber Co. v. Thompson, 215 Fed. 8 was distinguished by the same Court in *Great Northern v. Willard*, 238 Fed. 71, and the Court declared that the doctrine of that case would not be extended. In this latter case a small child was hurt, while playing on some railroad ties stacked along the railway right of way although it was with knowledge that the boys of the neighborhood were accustomed to play on them, and that they were attractive for that purpose.

In *Chesko v. Delaware & Hudson Co.*, 218 Fed. 804:

Defendant had a machine shop 6 feet back from a much travelled street. Its moving machinery was visible from the sidewalk through a wide double door. This door was kept open during warm weather and there was no guard, rail or screen to prevent the entry of children. The proofs showed that children were permitted to enter through this open door. Plaintiff aged 6 entered through this open door and while watching the men at work his hand was caught by an unguarded revolving cog wheel and injured.

The jury found "that the defendant had not exercised such judgment and care under the circumstances as a person of ordinary prudence would use in warding off children and guarding them against the danger that the *allurement* of the place might offer."

In this case the allurement confronted the child on the public street and there were men at work when the six year old child entered the machine shop, who should have excluded him at sight.

This case follows *Snare & Triest Co. v. Friedman*, 169 Fed. 1, where a child $4\frac{1}{2}$ years old, who was playing on the sidewalk of a public street was hurt by the fall of an iron girder which was piled in a heap along the sidewalk by the defendant contractor. This girder had become unstable through the action of other children playing upon it and rolled over on plaintiff, a child of $4\frac{1}{2}$ years when she attempted to sit on one end of it. She was too young to be guilty of contributory negligence. It was left to the jury to decide whether the defendant under the circumstances was not guilty of negligence in leaving these iron beams unsecurely fastened in a public street where children were accustomed to play within the knowledge of defendant. As in the case of *Lynch v. Nurdan* *supra* upon which the Stout case was based, the plaintiff child by virtue of the easement of the public in the sidewalk was not a trespasser and the defendant contractor though entitled to pile the iron girders on

the sidewalk, was bound to do so carefully and was liable for failure to do so, while the infant plaintiff was excused for its negligence which contributed to produce the injury.

In *Roman v. Leavenworth*, 90 Kan. 379; 95 Kan. 513.

The city actually *knew* that children played there and were attracted by the dumping of spoiled fruit, but took no precautions to drive them away. This was obvious negligence. The child was excused by his tender years from contributory negligence.

In *Kansas City v. Liese*, 71 Kan. 283; 80 Pac. 626.

A child of 12 years was drowned in a pond created by the city bringing a street across a deep ravine. Later the city built a structure over the surface of the water by driving a series of piles upon which a trough was laid in which the sewer pipe rested. This structure the Court held was an attractive and easily utilized means of enabling boys to get out to the deep water and from which to jump and dive. Plaintiff couldn't swim and nobody knew how he got into the deep water.

The Court said on these facts the case was indistinguishable from *Price v. Water Co.*, 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625, where the principle of the turntable cases was extended to cover the "attractive nuisance" doctrine. Judge Cunningham who wrote the opinion of the Court also wrote

a dissenting opinion, in which he stated "That in his judgment, the Price case carries the turntable cases beyond the danger limit. That no landowner could safely keep an apple tree on his premises, or maintain a pond to water his cattle.

The case of *Price v. Water Co.*, 58 Kan. 551, upon which the Liese case *supra* was based, was criticised by the U. S. Court of Appeals, 9th Circuit, in *Troglia v. Butte Superior Mining Co.*, 270 Fed. 75, as being against the weight of authority.

In *Light & Power Co. v. Healy*, 65 Kan. 798; 70 Pac. 884, the last case cited by said Court of Appeals,

The record shows that the owner knew that children were accustomed to play there, yet failed to take precautions either to stop the practice or to protect the children from injuries.

In a Kansas case not cited by said Court, (*Railroad Co. v. Bockoven*, 53 Kan. 279), where a railroad company had its own stock yards fenced, and a child was injured on the premises, Chief Justice Horton held that *the company wouldn't be liable unless it knew or should have known that children were accustomed to play on the premises.* And in the absence of knowledge the Court refused to imply a license, distinguishing both *Railway Co. v. Dunden*, 37 Kan., 1, a turn-table case, and the Stout case, on the ground that the defendant companies in these cases *knew* that the children had been in the habit of playing in the place where the injury occurred.

From an able article contributed by Hon. Jeremiah Smith to Vol. 11 Harvard Law Review, January 25, 1898, pages 349-434 entitled "Liability of Landowners to Children Entering Without Permission," which has been widely quoted, and referred to, in many of the best reasoned cases dealing with this vexed question, the following extract which is a summary of the duty of a landowner at common law owed to adults who entered his premises without permission; together with a query as to how far said law so summarized is applicable to children so entering.

"To adults entering without permission the landowner owes some legal duties. He is under duty not to intentionally inflict harm upon a trespasser, save when he is exercising within legal limits the rights of defense and expulsion. He is also, by the better view, under a duty to avoid harming the trespasser by negligent acts which result in actively bringing force to bear upon the trespasser. In other words, he is under a duty to use care not to harm the trespasser by bringing force to bear upon him. It is a mooted question whether this duty is confined to cases where the presence of the trespasser is known to the landowner. Some authorities hold that the owner may, in special circumstances, be under a duty to use care to ascertain whether trespassers are present before he sets in motion a force which would be likely to endanger any such persons if within reach. But the alleged duty, if admitted, is material only when it is sought to make the land-

owner liable for actively bringing force to bear upon the trespasser."

"On the other hand, the landowner is under no duty to have his land in safe condition for adult trespassers to enter upon. The law does not oblige him to keep his premises in repair for the benefit of a trespasser. The latter has ordinarily no remedy for harm happening to him from the nature of the property upon which he intrudes; he takes the risk of the condition of the premises. It is not negligence in a landowner to use his land for his own convenience in a manner which may occasion danger to future trespassers thereon. It is no breach of duty to a trespasser that a man's premises were in a dangerous state of disorder, whatever the consequences of the former. Nor is there any obligation to warn trespassers of dangers not readily apparent (assuming, of course, that the dangers were adjacent to a public highway, the owner may be liable for making changes on his land which endangers the safety of travellers who, notwithstanding their use of due care, accidentally deviate from the highway limits. But, with this exception, the owner is not responsible for the condition of his premises to persons entering thereon without permission."

"Such in brief," says Mr. Smith, "are the legal relations between landowners and adults entering without permission. Is there any difference in the case of children so entering?"

"Upon the question thus presented Mr. Smith goes on to say, "there is in this Country, a remarkable conflict of authority. Although

there are earlier cases bearing on the subject, there was little direct discussion of it before 1870; and it is probable that the general interest of the profession in the question was first excited by the decision of the United States Supreme Court in *Sioux City etc. R. R. v. Stout*, one of the earliest of the series, now known as "The Turntable Cases."

The facts in *Sioux City etc. R. R. Co. v. Stout*, 17 Wall. 657; 21 L-ed 745 are briefly as follows: Plaintiff, a boy six years of age, lost his foot while playing with a turntable on the uninclosed lands of the defendant railroad company. This turntable was out of repair in that the heavy catch, which by dropping into a socket stopped the turntable from revolving, was broken, and the evidence showed that it was the custom of railroads to have some catch or bolt on their turntables to prevent their revolving. On previous occasions within the observation and knowledge of the employees of defendant several boys had been at play about the turntable.

The question of contributory negligence was eliminated from the case by the disclaimer of defendant's counsel.

The case was tried below, 2 Dill. 294, before District Judge Dundy and Circuit Judge Dillon. Judge Dillon delivered the charge to the jury, which charge was as follows:

"This action rests, and rests alone, upon the alleged negligence of the defendant, and this

negligence consists, as alleged, in not keeping the turntable guarded or locked. Negligence is the omission to do something which a reasonably prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent or reasonable man would not do under all the circumstances surrounding the particular transaction under judicial investigation. If the turntable, in the manner it was constructed and left, was not dangerous in its nature, then, of course the defendants would not be guilty of any negligence in not locking or guarding it. But even if it was dangerous in its nature in some situations, you are further to consider whether, situated as it was on the defendant's property, in a small town, and distant or somewhat remote from habitations, the defendants are guilty of negligence in not anticipating or foreseeing, if left unlocked or unguarded, that injuries to the children would be likely to or would probably ensue. The machine in question is part of the defendant's road, and was lawfully constructed where it was. If the railroad company *did not know*, and *had no good reason to suppose*, that children would resort to the turntable to play, *or did not know, or had no good reason to suppose*, that if they resorted there, they would be likely to get injured thereby, then you cannot find a verdict against them. But if the defendant did know, or had good reason to believe, under the circumstances of the case, the children of the place would resort to the turntable to play, and that if they did they would or might be injured, then

if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence."

Mr. Justice Hunt who delivered the opinion in the Supreme Court, characterized the charge of the trial court as "impartial and intelligent," and in reviewing the evidence says:

"When it was proved to the jury that several boys from the hamlet were at play upon the turntable on other occasions and within the observation and to the knowledge of an employe of the defendant, the jury were justified in believing that children would probably resort to it and that the defendant should have anticipated that such would be the case."

In a note to *Wilmot v. McPadden*, 79 Conn. 367, contained in 19 L. R. A. (N. S.) 1107, the writer says:

"In fact, in the Stout case it seems to have been taken for granted that the railroad company owed a duty of reasonable care to prevent injury to the child. Of course if the company owed such a duty, the question whether it had been fulfilled might well have been left to the jury, under the circumstances of that case. This point is well brought out in *Dobbins v. M. K. & T. R. Co.*, 91 Tex. 63, 38 L. R. A. 573, 66 Am. St. Rep. 859, in which it was said that in the Stout case, there were three questions to be determined:

(1) Did the law impose upon the company a duty to use care to keep its property in such condition that persons going thereon without its invitation would not be injured?

(2) Was the child, six years old, guilty of negligence? and

(3) Was the company guilty of negligence in leaving its turntable unlocked?

“The first and most important question without an affirmative answer to which the third could not arise was not even referred to; and if we may judge from the opinion that learned Court’s attention was not called to its presence in the case; the second was admitted by the railroad in favor of plaintiff; and the third if the first were determined in the affirmative was clearly a disputed question of fact, which the Court correctly held was settled by the verdict. The main force of opinion is spent upon this third question, in attempting to show that the evidence was of such a character that the jury was justified in finding that the company had not used such care in guarding the turntable as a reasonably prudent person would have done under similar circumstances. There could have been no doubt upon this question. The opinion of the Court would have been much more satisfactory if it had undertaken to establish instead of assuming the affirmative of the first question.

The Stout case, which was decided in 1873, was followed by the decision of the Supreme Court of Minnesota (in 1875) in *Keffe v. Railroad*, 21 Minn.

207; 18 Am. Rep. 393. In this case Mr. Justice Younge said:

“Now what an express invitation would be to an adult the temptation of an attractive plaything is to a child of tender years. Also: The defendant therefore knew that by leaving this turntable unfastened and unguarded, it was not merely inviting young children to come upon the turntable, but was holding out an allurement, which acting upon the natural instincts by which such children are controlled drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault (for it cannot blame them for not resisting the temptation it has set before them) * * *

In the Stout case the following cases are cited:

Lynch v. Nurdin, 1 Ad. & El. (N. S.) 29;
41 Eng. Com. 422; 10 L. J., Q. B. 73; 5
Jur. 729;

Birge v. Gardiner, 19 Conn. 507;

Daly v. R. R. Co., 26 Conn. 591;

Bird v. Holbrook, 4 Bing. 628;

Loomis v. R. Terry, 17 Wend. 946;

Wright v. Ramscott, 1 Saund. 83;

Johnson v. Patterson, 14 Conn. 1;

State v. Moore, 31 Conn. 479.

In *Lynch v. Nurdin supra* the facts were as follows: the defendant's servant left his master's cart and horse unhitched and unattended upon a public street in London for half an hour. Some children

passing along the street were attracted by it, and began to play with it. Plaintiff aged 7 years got into the cart during the cartman's absence and while he was getting down from the shaft another boy started the horse which threw plaintiff to the ground, and his leg was broken by the wheel passing over him.

The defendant's counsel admitted the negligence of defendant's servant but pled the contributory negligence of the plaintiff and that the accident was the direct result of the interfering negligence of the other boy who started the horse at the moment was plaintiff was alighting.

Lord Chief Justice Denman said that the defendant's negligence in leaving the empty cart and deserted horse in the public street having tempted the child who merely indulged the natural instinct of a child in amusing himself, he ought not to reproach the child with yielding to that temptation; that the child acting without prudence and thought, had nevertheless shown these qualities in as great a degree as he could be expected to possess them; that his conduct bore no proportion to that of the defendant. It would seem from the foregoing that his lordship, while refusing to entertain the plea of contributory negligence, interjected the notion of the comparative negligence of the parties.

In *Ryan v. Towar*, 128 Mich. 128, the Court said that the *Lynch* case seemed to have gone off on the question of negligence and contributory negligence, no question of trespass having been discussed.

In *Friedman v. Snare etc.*, 71 N. J. L. 605; 70 L. R. A. 147; 108 Amer. St. Rep. 764; 2 A. & E. Ann. Cas. 497;

Judge Pitney, now Mr. Justice Pitney, in referring to *Lynch v. Nurdin*, said:

“Curiously enough the existence of a duty to the playing children, whose breach would constitute actionable negligence, was not made the subject of argument. Defendant’s negligence was conceded by counsel. The only controverted point was that the plaintiff’s own act co-operated to produce his injury. He was not debarred from recovering because of defendant’s negligence on account of his tender age.”

And after reviewing all the English decisions bearing upon *Lynch v. Nurdin*, Judge Pitney further says:

“It is safe to say, therefore that so far as *Lynch v. Nurdin* is relied upon in support of the present action, it has been distinctly discountenanced, if not necessarily overruled, by the later decisions.”

In *Railroad Co. v. Harvey*, 77 Ohio St. 235 l. c. 250 the Supreme Court of Ohio in scrutinizing *Lynch v. Nurdin* as the principal authority for *Railroad Co. v. Stout*, says:

“The horse and cart were left in the street. It was the duty of defendant to use care. The child was rightfully in the street, and the fact that he meddled with the car was not contributory negligence in one of his age and it is not properly a case of trespass.”

In *Bottoms, Admr. v. Hawks*, 84 Vt. 370 l. c. 37 Powers, J., says:

"It is to be observed that in *Lynch v. Nurdin*, the team was left standing in a public street—a place where the defendant's rights were qualified by those of the plaintiff * * * 'where there are different public easements to be enjoyed by two parties at the same time and in the same place, each must use his privilege with due care so as not to injure the other. *Eaton v. Railroad*, 129 Mass. 379.' "

In *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301, Peckham J., (afterwards Mr. Justice Peckham) points out that there is a great difference in the facts between the case of *Lynch v. Nurdin* and the case then before that court, a turntable case, in which the Stout case was cited by plaintiff.

We quote from the opinion as follows:

"Leaving a horse and cart in a public street unattended and loose, subject to natural observation and interference from children passing along the street, might be held a proper subject for the jury to say whether it was or was not negligence, while in the case of a defendant on his own land in simply doing that which it is necessary to do in order that he may carry on his business properly and who fails to exercise the highest vigilance in order to protect from possible harm children who may stray upon his land for no other purpose than recreation, we think there is an absence of any fact upon which a jury ought to be permitted to find negligence."

Birge v. Gardiner, 19 Conn. 507, the next case cited by Mr. Justice Hunt, was where a boy passing along a highway put his hand on a heavy gate on defendant's land abutting on the roadway, and by shaking it as he went past caused it to fall and injure him. The gate was unsecurely fastened.

The Supreme Court of Connecticut in the later case of *Fitzmaurice v. Conn. R. & L. Co.*, 78 Conn. 406 held that the doctrine in the *Birge* case did not apply where a child strayed upon defendant's land and was burned on a heap of smouldering ashes since in that case the child was a mere trespasser.

In the still later case of *Wilmot v. McPadden*, 79 Conn. 367, the Court says in refusing to follow the *Stout* Case in a case involving the "attractive nuisance" doctrine:

"We have never had occasion to deal directly with this question (attractive nuisance); it was not involved in *Birge v. Gardiner* 19 Conn. 507; any expressions that might favor the doctrine in *Daly v. Nor. & West. R. Co.*, 26 Conn. 59, are modified and corrected in *Nolan v. N. Y. N. H. & H. R.*, 53 Conn. 461-474, and in *Rohloff v. Railroad*, 76 Conn. 689-694, and in *Fitzmaurice v. Conn. R. & L. Co.*, 78 Conn. 406. * * * It (attractive nuisance) is the distinction between a liability arising from one's own fault and a liability arising from another's misfortune; between the enforcement of a debt and the compulsion of a gift."

The remaining cases cited by Mr. Justice Hunt

are all cases where there was a wilfull intent to injure trespassers and are obviously inapplicable; *Bird v. Holbrook*, 4 Bing. 626, was where the plaintiff was injured while trespassing by the discharge of a spring gun which had been set by the defendant for the protection of his property from thieves; *Loomis v. Terry*, 17 Wend. 496 was the case of a boy hunter hurt by a ferocious dog; in *Wright v. Ramscott*, 1 Saunders, 83, defendant unnecessarily killed a dog which was fighting with his own dog; in *Johnson v. Patterson*, 14 Conn. 1, defendant poisoned plaintiff's hens; and *State v. Moore*, 31 Conn. 479 was another spring gun case.

The difference between these cases and the Stout case is so plain as to need no discussion.

"The Stout case itself was an innovation upon the theretofore accepted common law rule that a landowner is not liable for the visible condition of the premises to one who enters upon them without permission. It is therefore an exception to a well known rule of law rather than in itself a rule of law."

Salliday v. Old Dominion Copper Mining Co., 12 Ariz., 124; 100 Pac. 441.

See also *Stendal v. Boyd*, 73 Minn. 53; 43 L. R. A. 228; where the Supreme Court of Minnesota speaking through its Chief Justice says: "The doctrine of the turn-table cases is an exception to the rules of non-liability of a landowner for accidents from visible causes to trespassers on his premises, and if the exception is to be extended to this case

(a dangerous excavation filled with water on a city lot where a little boy had been drowned) then the rule of non-liability as to trespassers must be abrogated as to children and every owner of property must at his peril make his premises child proof."

It will be remembered that the Supreme Court of Minnesota was one of the first to give its adherence to the turntable doctrine by the decision in *Keffe v. Railroad*, 21 Minn. 207.

The cases cited by Mr. Justice Hunt in rendering the opinion of the Court except *Daly v. Railroad* (since overruled) come within other well defined exceptions to the same general rule as is clearly pointed out in *Daniel v. Railroad*, 154 Mass. 349; 13 L. R. A. 248; 26 Am. St. Rep. 353; and in *Pannell v. Railroad*, 105 Va. 18, Ann. Cas. 862; 4 L. R. A. (N. S.) 80; and 115 Am. St. Rep. 871 and therefore do not add anything to the authority of the Stout case. But the fact that they were cited in the Stout case gave them a tremendous importance for the reason that the decision in the Stout case, having announced as we have endeavored to show a new exception to a general rule of the common law, aroused the general interest of the profession, and instigated wide spread inquiry as to the breadth and extent of the new doctrine.

Under these circumstances all the authorities cited in the Stout case were carefully studied by Courts and the Bar for the purpose not only of testing the soundness of the reasoning which underlay

the new exception to the old rule which came to be known as the "turntable doctrine," but also for the purpose of determining whether the new doctrine was applicable to the many cases constantly arising where children were injured while intruding upon private premises, by other agencies.

The remarkable confusion which exists today among the federal courts of the several circuits and among the courts of the several states over the question of liability of landowners to trespassing children which has followed the decision of the Stout case is probably due to the fact, *first* that the Stout case is an exception as we have attempted to show to the rules of non-liability of a landowner for accidents from visible causes to trespassers on his premises, at common law, and *second* to the uncertainty as to what actually was decided in the Stout case, caused by the citation of such cases as *Bird v. Holbrook* (*supra*) and other spring gun cases.

That such is the fact can be seen from the following example. In *Union Pac. R. Co. v. McDonald*, *supra* Mr. Justice Harlan, after unnecessarily going out of his way to approve the Stout case, and reviewing cases cited therein, cites *Townsend v. Walchen*, 9 East 277-299, as a further case in point, though it is not cited in the Stout case. In this case the declaration alleged that the defendant "wrongfully intending to catch, maim and destroy the plaintiff's dog," placed traps baited with flesh in a wood on

defendant's land near divers highways and near the ground of the plaintiff; and that the plaintiff's dogs were by the scent of the flesh enticed from, said highways and grounds to the traps and were caught therein and wounded. A verdict was returned for the plaintiff and a motion for arresting judgment was refused. The defendant also moved to set aside the verdict as against the evidence; contending "that there was no evidence that the trap was purposely set to catch the plaintiff's dogs," or "that the traps were set for the purpose of catching dogs in general." The evidence on these points at the trial was in brief that the defendant had long maintained the traps in the situation alleged in the declaration; that in one year no less than seven dogs had been killed in these traps; that the defendant had known and approved of it; and that the defendant allowed his game-keeper one shilling for every dog killed in the traps. It is obvious that this latter case is no authority in favor of children plaintiffs in turntable cases.

The learned Justice, after commenting upon this case as being analogous to the case at bar, (*Union Pac. Ry. Co. v. McDonald*) where children were permitted to visit a coal mine in close proximity to which was a smouldering slack pile quotes the following paragraph from *Thompson on Negligence*.

"Because it would be a barbarous rule of law, that would make the owner of land liable for setting a trap thereon baited with stinking

meat so that his neighbor's dog attracted by natural instincts might run into it and be killed, and would exempt him from liability for the consequences of leaving exposed and unguarded on his land, a dangerous machine, so that his neighbor's child attracted by it, or tempted to intermeddle with it by instinct equally strong might thereby be killed or maimed for life."

1 Thompson on Negligence, Sec. 1031.

To bring the Stout case within *Bird v. Holbrook*, or *Union Pac. Ry. Co. v. McDonald* within *Townsend v. Wathen*, "it would be necessary to prove that the railroad company maintained the turntable and the slack pile with the express intention of catching and maiming their neighbors' children, and that the directors were in the habit of rewarding their section foremen at a certain rate per head for each child so maimed or killed."

Landowner's Liability to Children.

XI Har. Law Rev. Hon. Jeremiah Smith, p. 358.

This present case is an eloquent argument against the extension of the doctrine of the turntable cases into that nebulous domain called "attractive nuisances."

Defendant has the misfortune to be the owner of a barren tract of 20 acres of land, which it acquired for a factory site where it for 8 or 9 years manufactured spelter and sulphuric acid. On September 1, 1910, it discontinued manufacturing at Iola, and during the fall removed all its machinery

and portable assets and demolished some of its buildings itself and sold the others to purchasers, who wrecked them for the materials composing them. Except that its superintendent, Mr. Friebe, remained in Iola until sometime in December to oversee the removal of its portable property, defendant and all of its officers left Iola for Argentine, Kansas, where it had another plant, so that after December, 1910, nobody connected with the defendant remained at Iola. This condition of affairs continued unchanged from at least January 1, 1911, to July 28, 1916. When the old factory site was abandoned it had a fence around it, which was in fairly good repair and on which were notices forbidding trespassers to enter.

On the afternoon of July 27, 1916, plaintiffs, who live the life of nomads, whose home was a prairie schooner, unhitched their horses and resumed house-keeping a short distance from defendant's land, and the next day their two little boys roaming about on defendant's land discovered the water filled basement and lost their lives, either owing to the fact that the water was polluted with chemicals, or because they couldn't swim, probably because of the two reasons, since their rescuers, who could swim, were able to defy the poisonous character of the water. The happening of this tragedy was the first actual knowledge the defendant had there was anything upon its land that was a source of danger to anybody. So that there could be no moral guilt or

blame for this sad occurrence. Did it owe the plaintiff's any legal duty for the breach of which, it should pay the plaintiffs such a sum of money as a sympathetic jury whose feelings adroitly aroused by eloquent counsel, should award?

"At common law and until the new doctrine of "attractive nuisances" was evolved out of an extension of the doctrine of the turntable cases, the landowner or occupant owed no duty to trespassers or volunteers going upon his land for their own purpose to maintain it in any particular condition for their benefit." *Sweeney v. Railroad*, 10 Allen (Mass.) 1. c. 372.

As characteristically said by Judge Lamm in *Kelly v. Benas*, 217 Mo., 1. c. 9;

"Volunteers, bare licensees and trespassers take the premises for better or for worse, as they find them, assuming the risk of injury from their condition, the owner being liable only for concealed spring guns, or other hidden traps intentionally put out to injure them, or any form of willful, illegal force used towards them. To invitees, however, he owes the active duty to exercise reasonable care for their safety."

Was the defendant negligent in not anticipating what took place upon its premises through the elements acting upon a soil that had been saturated with chemicals through long years of occupation by a chemical factory? If defendants had known that surface water had been diverted into one of the basements left upon its premises, would it, or any

other reasonably prudent and cautious individual, have suspected that there was any danger in the situation thus arising, considering its location in the interior of its large tract of waste land, on the outskirts of a small town?

In considering whether by exercising reasonable care the defendant should have anticipated that a dangerous "pool" would form on its premises, how much weight would a jury give to what was reasonable care and caution of a landowner when confronted by a concrete case appealing strongly to their sympathies?

There is not, nor has there ever been, a sweeping rule that a landowner is responsible for all injuries received by children upon his premises. Such a rule would make every property owner the guardian, for the time being, of such children as should desire to trespass upon his land. In order to hold the owner responsible in this case the defendants in error must show that the facts place the case in one of the exceptions to the general rule that a landowner owes no duty to a trespasser for injuries received in the course of the trespass.

The case does not fall within the *Turntable Doctrine* because: (1) this was not a dangerous and attractive machine; (2) children were not accustomed to play at or near this basement; (3) the Zinc Company had no knowledge of and danger to children; (4) no license can be implied to children to play at this spot.

The case does not fall within the Attractive Nuisance doctrine because: (1) it does not appear that this basement was attractive to children; (2) the evidence does not establish the fact the basement was visible from off the premises; (3) no invitation to enter can be implied.

Nor does the case fall within the theory of the Trap or Spring Gun cases because: (1) the Zinc Company had no knowledge of the existence of this basement so filled with water; (2) the element of wilful intent is completely lacking.

"In many jurisdictions the correctness of the conclusion reached (in the Stout case) is denied and in some of the states where that decision was followed the courts have repudiated the doctrine, in others they have limited it, and in still others they have declined to follow the doctrine in any case excepting a turntable case."

In the following cases the turntable doctrine was never accepted:

Masachusetts:

Daniels v. Railroad, 154 Mass 349; 13 L. R. A. 248; 26 Am. Rep. 253;

Michigan:

Ryan v Towar, 128 Mich. 463; 55 L. R. A. 310; 92 Am. St. Rep. 481;

Montana:

Fusselman v. Yellowstone Valley etc., 53 Mont. 254;

New Hampshire:

Frost v. Railroad Co., 64 N. H. 220; 10 Am. St. Rep. 369; Ann. Cas. 1918;

New Jersey:

D. L. & W. R. R. Co. v. Reich, 61 N. J. L. 635; 41 L. R. A., 851; 68 Am. St. Rep. 727; *Friedman v. Snare & T. Co.*, 71 N. J. L. 605;

New York:

Walsh v. Railroad Co., 145 N. Y. 301; 27 L. R. A. 724; 45 Am. St. Rep. 615.

The decision in this case was rendered by Judge Peckam (afterwards Associate Justice of the Supreme Court) who carefully reviews the authorities cited by Mr. Justice Hunt in the Stout case and denies that they support the conclusions reached in the opinion.

Pennsylvania:

Gillespie v. McGowan, 100 Pa. 150; *Thompson v. B. & O. R. Co.*, 218 Pa. St. 444; 9 L. R. A. (N. S.) 1162.

Rhode Island:

Paolina v. McKendall, 24 R. I. 432; 60 L. R. A. 133; 96 Am. St. Rep. 736; 120 Am. St. Rep. 897.

Vermont:

Bottum's Administrators v. Hawkes, 84 Vt. 370; Ann. Cas. 1913 A. 1025 and Notes p. 1032; 35 L. R. A. (N. S.) 449.

The opinion in this case is exhaustive and well reasoned.

Virginia:

Pannill, Admr. Leo Walker v. Railroad, 105 Va. 226; 4 L. R. A. (N. S.) 80; 115 Am. St. Rep. 871; 8 Am. & Eng. Ann. Cas. 862.

West Virginia:

Conrad v. Railroad, 64 W. Va. 177;
Ritz v. Wheeling, 45 W. Va. 267; 43 L. R. A. 148;
Athormorten v. Boggs Run Co., 50 W. Va. 457; 55 L. R. A. 911; 88 Am. St. Rep. 884.

The following States followed the Stout case and adopted the turntable doctrine:

California:

Barrett v. Railroad, 91 Cal. 296;

Connecticut:

Daley v. Railroad, 26 Conn. 591;

Georgia:

Ferguson v. Railroad, 75 Ga. 637;

Illinois:

Pekin v. McMahon, 154 Ill. 141;

Iowa:

Edgington v. Railroad, 116 Ia. 410;

Kansas:

Kansas Central Ry. Co. v. Fitzsimmons, 22 Kan. 686;

Kentucky:

Branson v. Labrot, 81 Ky. 638;

Minnesota:

Keffe v. Railroad, 21 Minn. 207;

Missouri:

Koons v. Railroad, 65 Mo. 592;

Nebraska:

A. & N. R. Co. v. Bailey, 11 Neb. 332;

Ohio:

Harriman v. Railroad, 45 Ohio St. 11;

South Carolina:

Bridger v. Railroad, 25 S. C. 24;

Texas:

Evansich v. Railroad, 57 Tex. 126;

Tennessee:

Railroad v. Cargille, 105 Tenn. 628.

The following cases taken from jurisdictions which in earlier cases approved the turntable cases show that the tendency in them is to limit the doctrine strictly to turntable cases and not to extend it so as to embrace the so-called "Attractive Nuisance" doctrine.

California:

Peters v. Bowman, 115 Cal. 345;

Connecticut:

Wilmot v. McPadden, 79 Conn. 361; 19 L.
R. A. (N. S.) 1101;

Georgia:

Railroad v. Beavers, 113 Ga. 398;

Minnesota:

Stendel v. Boyd, 73 Minn. 53.

Missouri:

Kelly v. Benas, 217 Mo. 1.

In this case Judge Lamm reviews all the Missouri turntable cases.

Ohio:

Wheeling etc. R. C. v. Harvey, 77 Ohio St. 235; 11 Ann. Cas. 981; 19 L. R. A. (N. S.) 1136; 122 Am. St. Rep. 903.

This is a leading case.

Texas:

Dobbins v. Railroad Co., 91 Tex. 60; 38 L. R. A. 578; 66 Am. St. Rep. 859.

This is a leading case.

The question here presented is one of first impression notwithstanding *Union Pac. R. Co. v. McDonald supra* because as we have shown, what was said in that case on the subject of attractive nuisances was *dicta* and the opportunity is here presented to put a *quictus* upon a dangerous heresy by keeping within the well known landmarks of the common law, and by leaving changes in the law to be made by the legislature where they belong.

Respectfully submitted,

HENRY D. ASHLEY,

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Attorneys for Plaintiff in Error.

Of Counsel

Henry D. Ashley.

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Supreme Court of the United States

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UNITED ZINC AND CHEMICAL COMPANY,
PLAINTIFFS IN ERROR,

VS.

VAN BRITT AND SUSIE BRITT, DEFENDANTS
IN ERROR.

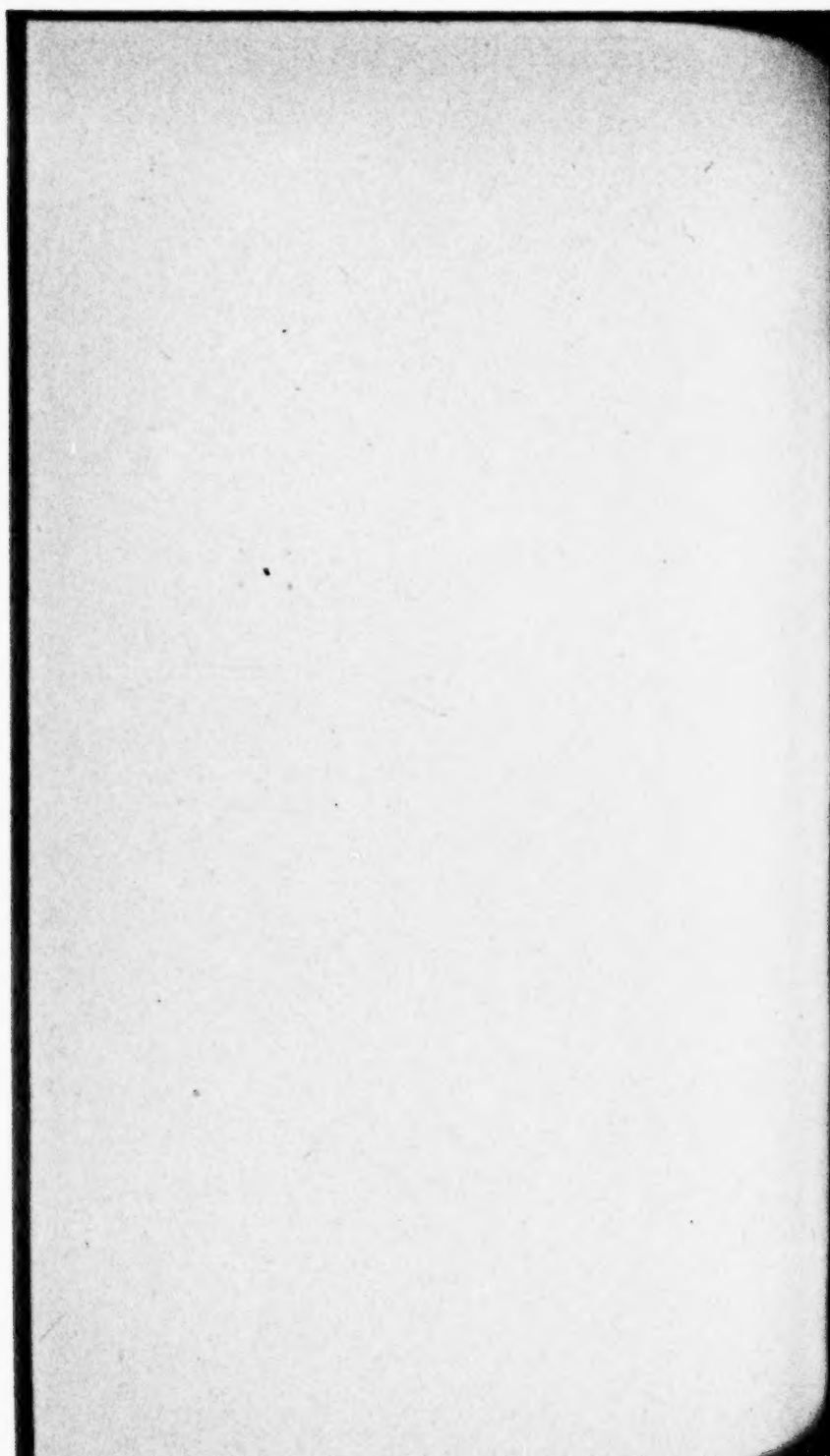
**BRIEF IN BEHALF OF DEFENDANTS IN
ERROR.**

or.

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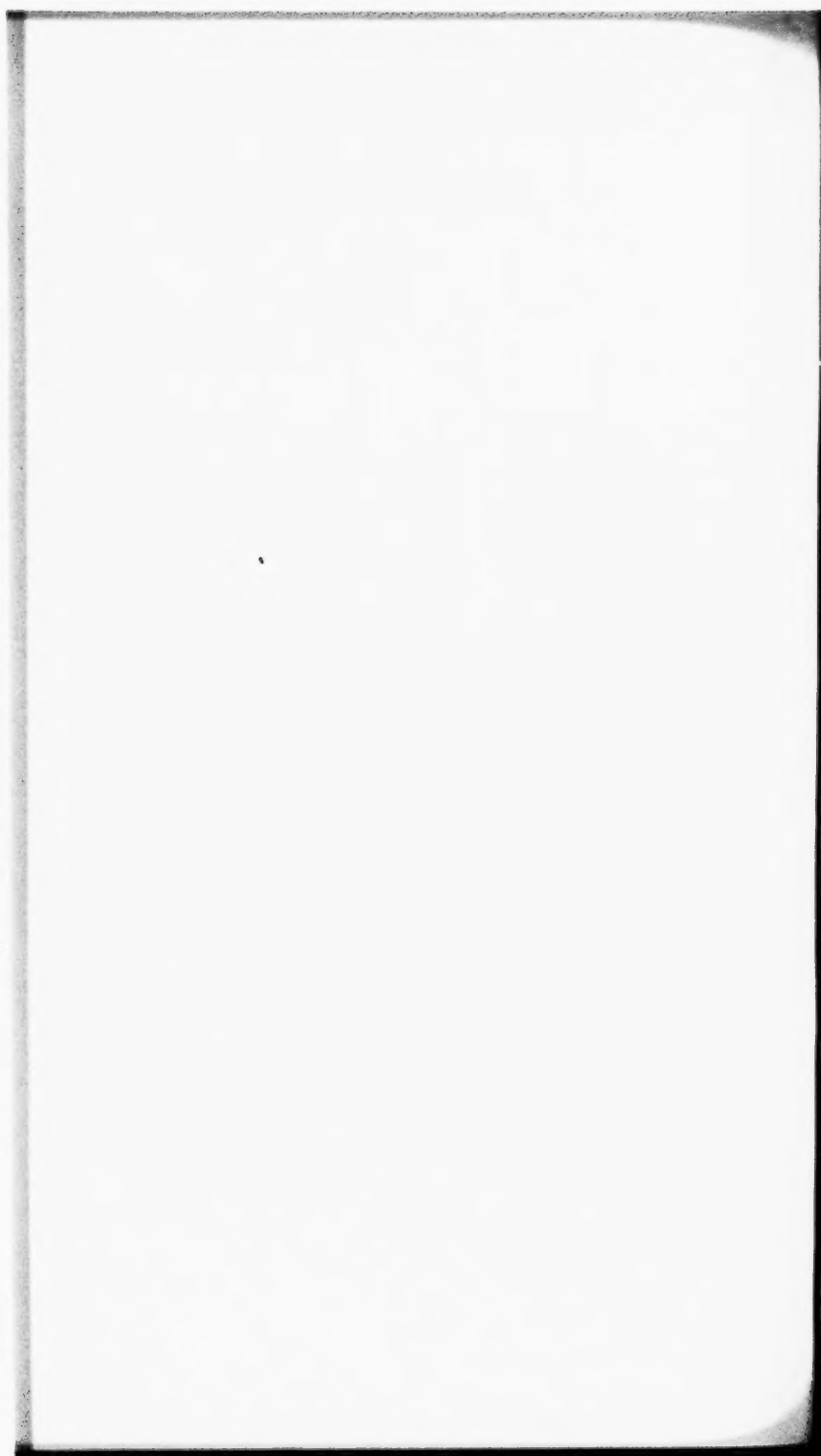


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No. 164.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1921.

UNITED ZINC AND CHEMICAL COMPANY,
PLAINTIFFS IN ERROR,

VS.

VAN BRITT AND SUSIE BRITT, DEFENDANTS
IN ERROR.

**BRIEF IN BEHALF OF DEFENDANTS IN
ERROR.**

STATEMENT.

The court is called on in this case to determine whether plaintiff in error shall respond in damages to the parents of two boys, aged eight and ten, whose lives were lost on account of their going swimming on a hot July day in an attractive pool of water upon the premises

of plaintiff in error, which pool of water had been allowed by the plaintiff in error to become impregnated with sulphuric acid previously manufactured by plaintiff in error at the place where the boys found this pool, and which pool was allowed by plaintiff in error to remain unguarded upon its premises after it had dismantled its plant, used in the manufacture of this poison, and which pool of water, because of its location and appearance, was attractive to the boyish instincts, and upon being seen by them for the first time caused them to go bathing therein. The plaintiff in error had previously used the pool and the surrounding premises for many years in the manufacture of sulphuric acid which is conceded to be a deadly poison. Large quantities of this acid were left in and about the pool at the time plaintiff in error dismantled its plant. The two boys had never been in the vicinity before, and were there with their parents at the time visiting their uncle. The grounds were wholly unfenced and unguarded, and were crossed and recrossed with roads and pathways. The boys followed the well travelled road and pathway leading to and through the premises to this pool of water, and while thus passing by upon the premises were attracted to it, and allured to go bathing therein. One of the boys died while being taken from the pool. The other died a most terrible death on the following day.

The recitation of the facts by plaintiff in error, and the innuendos and impressions sought to be constructed and made by a misquotation of the facts, have been so freely indulged in that we fear unless we call attention

to the proofs as disclosed by the record the court might gain an erroneous impression and get the wrong setting for this case.

George W. Lee, an engineer, testifies (Rec. 15) :

Q. You may tell the jury whether or not any sulphuric acid was poured into the pit where these towers and machinery was?

A. Yes, it was.

At Record 16 he stated :

Q. Tell the jury how it was poured in. State the facts.

A. It was poured in by taking those tiles in and emptying them into the pit. Take the tiles down and empty it in there.

Q. What do you mean by tiles?

A. Well, it was four square tiles that run through this building.

Q. You mean through the building that stood north of this zinc pit?

A. Yes, sir; right north of that zinc pit, goes down in there.

Q. What was that building for?

A. Well, that was for the acid.

Q. That's where they made the acid?

A. That power building; yes, sir.

Then on page 16 he stated :

Q. When this acid was poured in there, tell the jury how near it came to filling these different pits?

A. It filled those pits up full, and other stuff that was throwed in there with it.

Q. Other stuff; what do you mean, chemicals?

A. Chemicals; yes, sir.

Q. From what were they poured out of?

A. Poured out of barrels, put in barrels and poured in there.

Q. Were those chemicals and stuff used there with which they manufactured sulphuric acid?

A. Yes, sir; what they used in manufacturing it.

Q. You are not undertaking to say that you understand what they all were?

A. No, sir; I couldn't say.

Then on page 21 he testified:

Q. What was the color of the acid you saw put in?

A. I couldn't tell the color, sort of brownish colored stuff that laid in the pipes there.

On page 21 he further testified:

Q. Do you know it was in the pipes at all?

A. Certainly.

Q. Did you see them take it out of the pipes?

A. Saw them pour it out in there.

Q. Was it a fluid?

A. Yes, sir; it was fluid.

Q. What pipe was it poured out of?

A. Poured out of the pipes the acid run through and went around.

Q. What kind of pipes were they?

A. I couldn't say, never had hold of them.

Q. Iron or wood?

A. Lead, I suppose.

Q. Lead?

A. That is what I thought, they would empty them right in there as they took them out.

Q. Were you there when that was done?

A. Yes, I was in there when they was emptying some of them.

Q. Was any of the stuff you say put in there, liquid?

A. It was all liquid, the acid part was.

Q. And how much of that did you see poured in there?

A. I couldn't tell you, I ain't no idea.

Q. Where did it come from, I mean what building?

A. Tower building.

Q. Right down from the tower?

A. I don't know if it was right down from the tower, but they would loosen the pipe and pour it down in there and run it into the pit.

Q. Were those lead pipes open in this place, taken apart, so you could see them?

A. Yes.

It will be observed the witness made no mention of wooden barrels. He did not state that the sulphuric acid was poured out of barrels. He stated the acid was poured out of the four tiles and the lead pipes in the tower which ran through the building. He merely stated that the stuff that was poured out of the barrels was some kind of a chemical.

Plaintiff in error undertakes to make some sort of a hazy unsupported and unverified claim that its building was dismantled by someone other than itself. The witness on this subject,

A. A. Stockton, testified as follows: (Rec. 84)

Q. Was there any of the sulphuric acid drained out of these pipes into the pit and was it there when you quit cleaning up?

A. Lots of it.

Q. How much was there?

A. Probably a hundred barrels, or a hundred and fifty, I couldn't say. I couldn't give much estimate,—it was all the time draining in while we were cleaning up. I took out the three main towers of the tower building—wrecked that myself, managed it.

Q. Mrs. Simmons was there all the time, off and on?

A. Yes, all the time.

Record 87 he testified that the last work he did there was done for Simmons in taking the castings out of the cement piers, Simmons being the plaintiff in error's representative. Witness said (Rec. 88).

Q. Who paid you, Mr. Stockton?

A. The Company (plaintiff in error) paid me.

At Record 83 the witness testified: ,

Q. Did you ever work for the United Zinc and Chemical Company while they were operating their plant there?

A. Yes, sir.

Q. How long did you work for them?

A. Well, all told, I guess I worked something like a year.

Q. Did you work for them after the plant had ceased operating, and while it was being dismantled?

A. Yes, sir.

Q. Did you do the last work that was done there about the acid pit or plant?

A. Yes sir.

Q. For the defendant Company?

A. Yes, I cleaned up and did about the last work done there.

Q. What was the last work you did there?

A. The last work I done was shooting out some castings out of the cement piers, the tower set on for the building.

Q. Who did you do that work for?

A. The defendant company.

Q. Who was foreman there in charge of that work?

A. Right at that time Mr. John Simmons was looking after the Company's interest.

Q. That was the cleaning up of their work there?

A. Yes.

Q. Was any of that work you did near the acid basin or cellar?

A. Right around it and over it. Right around the basement.

Q. You may tell the jury now when you was doing that work, cleaning up there for the company as you have just stated, if you observed any sulphuric acid in this pit or basement?

A. Well, it was dreaning in there more or less all the time from different directions where we were taking up a lot of lead piping.

Q. Lead pipe that had been used in connecting—

A. (Interruption) Lead pipe connecting—that led across the railroad tracks spur to the tank building where they loaded in the tanks from the cars.

Q. And were those pipes leading into the basement?

A. They did lead into the basement. They were taken out while I was working there.

Q. You mean to say this acid dreading out of these pipes as being removed?

A. They had been removed while I was cleaning up or doing the last work there.

Q. Now they manufactured sulphuric acid there, did they?

A. That was what they claimed to do.

Q. Did you see it?

A. Yes, I seen it but I ain't much acquainted with that kind of business.

Q. Was there any of the sulphuric acid dreading out of these pipes into the pit and was it there when you quit cleaning up?

A. Lots of it.

And again on page 86 we have this testimony:

Q. But this last work you did cleaning up for the company, Mr. Simmons was there for the company?

A. Yes, he was working in the interest of the company.

Q. In charge and control of its business?

A. Yes.

Q. Could he see and observe this acid and stuff in the cellar there?

A. Sure could. Nothing to hinder anyone from seeing it.

Q. Mr. Stockton, how far do you live from this pool of water?

A. About 80 rods I think.

Q. Which way.

A. Northwest.

Q. Have you frequently passed this pool of water, and seen it since the buildings were removed?

A. Oh, yes, very often.

Q. Tell the jury, describe it at the different times you passed it and saw it.

A. I couldn't have much idea of the different times.

Q. Describe its appearance to the jury whether the water was clear or not.

A. I passed it there when it would be full up to the top of the wall and be clear. And then I have passed it when it was not more than half full different times. I live close by and am frequently down past there.

Q. But the last work you did there in shooting these castings out as you stated and cleaning up, who did you do that work for?

A. That was done for Simmons, the last work I done was taking the castings out of the cement piers.

(Record 87):

Q. Was that after the towers had been taken down?

A. Yes, sir.

Q. That was the last work you done?

A. That was the last work I done.

Witness Lee testified (Record 14):

Q. Did you ever work for the defendant, the United Zinc and Chemical Company?

A. Yes, sir.

At Record 15:

Q. Who was the last foreman or representative of the company there?

A. John Simmons.

Q. Did you work under Mr. Simmons a while?

A. Yes, sir.

Q. Was he the last man who was there for the defendant company when all the machinery and stuff was taken away?

A. So far as I know he was.

Q. When this machinery and stuff was being moved away or the buildings being torn down as you have stated, you may tell the jury whether or not any sulphuric acid was poured into that pit where these towers and machinery was?

A. Yes, sir; it was.

Q. Do you know whether it was or not?

A. Yes, sir; I saw it poured in there.

On Record 17 this witness testified:

Q. You may tell the jury whether there was ever any fence, barrier or protection of any kind placed there after the machinery and buildings were removed?

A. Has not been none of any kind.

Q. Have you passed that place frequently since the buildings have been torn down?

A. Yes, sir.

Q. Tell the jury whether or not later it filled up with water.

A. Oh, yes, filled up with water.

Q. Have you examined it or rather looked at it as you have passed it frequently?

A. Yes.

Q. Was the water clear or not?

A. Yes, it was clear on top. Seemed to be kind of muddy, milky, brown looking sediment in the bottom.

Q. I mean the top of the water, did it appear clear?

A. Yes, sir; the top of it was clear and nice.

On Record 19 the witness testified that this stuff which the plaintiff in error poured in the basement would eat his hands, flesh and clothes, and that he had to wear rubber pads when handling the machinery.

Professor Lamer, a chemist and teacher of science in the high school in the city of Iola, holding degree from Yale and university of Kansas testified (Record 74) relative to the appearance of the water that it was very clear. On the bottom of the pool there was a sediment or precipitate yellowish in appearance.

Witness Brown, who went to the rescue of the boys, and who went into the water himself, testified (Record 25) that after being in the water he was unable to sleep at all the first night, and was at least two week recovering from the effects of his experience. On Record 26 the witness continues to testify that as a result of going into the water he suffered an injury to his foot and leg which consisted of a burning sensation that lasted for a week or two and during that time was very sore and painful. That the reason he did not sleep at all the first night after being in this water was because of the pain about his head and eyes. That the water got around his eye lids and was so painful it kept him walking the floor all the night.

The witness Dalton (Record 32) who helped take these boys out of the water, testified:

Q. What effect did that have on you, Mr. Dalton?

A. Well, different ways, choked me; when we got out the water could hardly get my breath and wasn't able to go back in after the other.

Q. Did you get any in your mouth or nostrils?

A. I did.

Q. What effect did it have.

A. About like it would to eat an Indian turnip, burned.

Q. Did it smart and burn?

A. Yès, sir.

Q. You may state what effect it had on the body during that day and night.

A. Burned all that day and that night too, and I bathed in soda water and kind of stopped it a little bit.

Q. How long did you notice any effect?

A. Oh, it burned for quite a while, a month, I guess, something like that. Noticed burning a little now and then.

Q. Get any in your eyes?

A. I did.

Q. What effect did it have on your eyes?

A. Well, burned pretty bad—don't know, and hurt them so bad; burned pretty bad, couldn't look at anything very long.

Q. Get any in your ears?

A. Didn't notice any in my ears.

Q. Now, you say you got some in your mouth. You may state what effect it had on your tongue and lips and mouth.

A. Made my tongue and lips awful sore.

Q. Did you go home soon after that?

A. Went home soon after taking the boys away.

Q. What for?

A. Went home to get the clothes off to see if I could stop that burning.

Q. Now you say it almost smothered you. Tell the jury how it affected your breath or wind.

A. When I went under I guess I had my mouth open, and it strangled me. Couldn't breathe for quite a little bit as I come up.

Jake Lee, one of the witnesses who went into this pool of water to help rescue the boys, answering a question as to what effect the water had on him, stated (Rec. 38):

Q. Well, what effect did the water have on you if you discovered any?

A. Well, it hurt my eyes and my lips peeled off; whether caused from the water or not, I do not know; but they peeled off anyhow.

Another witness, Arthur Burnett, testified (Rec. 55):

Q. How long were you in there?

A. Probably three or four minutes. Long enough to help pull one of them out.

Q. What effect did that water have on you, if any?

A. Just itched and burned.

Q. Did you have your clothes on?

A. Yes, sir; left mine on.

Q. Now, to what extent did it itch and burn you, and what part of your body did it affect?

A. Just what part was in the water.

Q. How deep was the water where you went in?

A. Probably a foot.

Luther Creason, Fire Chief of the City of Iola, came with a pulmotor and made an effort to save the life of the boy who was taken out of the pool in a dying condition (Record 67).

Q. Now tell the condition you found the boy in.

A. Well, when they called me out there with the pulmotor they had the boy out and was on the bank of the pool; and I started to put the pulmotor on him; had to open his mouth to get the phlegm out and when opened his mouth found his tongue was swelling and seemed to be burned in kind of a crisp; I finally got his mouth cleaned out; got the pulmotor working all right; run it there a few minutes and he began to gasp like and took the pulmotor off; and when I took it off he went back; and we tried it again and then there would be a gush of this water and stuff come up and couldn't do any good. His body had red spots all over from the knees up.

Q. What kind of spots?

A. Well, reddish looking spots, looked like from a burn or something of that kind.

Q. How large would these spots be?

A. As large as a dime to a nickel.

Q. Did it appear to be blistered or burned?

A. Yes, sir.

Q. Now, you say, when you first opened his mouth and before you arranged the pulmotor to use it his tongue was swollen?

A. Yes, sir.

Q. And to what extent?

A. Well, it was swollen pretty thick.

Then the witness went on to testify that his tongue appeared to be burned to a crisp, began to get stiff directly after he got there, and that his experience with a person who was drowned was that the tongue would not swell.

Witness Ernest Huffard, who also went to the rescue of the boys, testified (Rec. 43) :

Q. Did you observe any burns or blisters on his mouth or face or any place?

A. Well, I could see red spots on his body. Don't know what it was caused from.

Q. Just describe the red spots, what they looked like?

A. Well, looked kind of like sunburn; just red in spots.

Q. Different spots over the body?

A. Yes, sir.

Q. Did you see the little boy that was yet alive?

A. Yes, sir; talked with him.

Q. Pay any attention to him particularly?

A. Well, was talking to him when sitting on the bank.

Q. Did he vomit any?

A. Yes, sir.

Q. Did he appear to be conscious and all right?

A. Well, he was not when he first come out, vomited, talked for five minutes anyway after he came out.

The undertaker who took care of the body of the boy who died at the pool testified (Rec. 71) : That the boy's body had new sores upon it. Regarding the other

boy who lived until the next day the undertaker testified that this boy lay there on his bed asking his father to do something for him. He was in convulsions. He would tie up in a knot and gasp for breath. Couldn't get his breath. These convulsions would last for a minute or two, then he would relax and lay there, seem to be normal, and then would go into convulsions again.

Professor Lamer who is a chemist and scientist, testified to tests made of the water in this pool that he found zinc sulphate and sulphuric acid in appreciable quantities.

Professor Bailey, long in charge of the Chemistry department at the Kansas University, analyzed the water in this pool (Rec. 88-89) and testified that it contained deadly poisons, both sulphuric acid and zinc sulphate to such an extent that it would be dangerous to human life for anyone to go bathing in the pool.

Dr. Sutcliff, who treated the boy who lived until the next day, testified (Rec. 78). That the boy was in severe colicky pains, vomiting and gasping for breath. That he put him under an opiate on account of this, and kept him on the porch where he could get the air. He further testified that the boy died on the following day as the result of the swelling of bronchial tubes and gastro intestinal irritation. The doctor testified (Rec. 80) that the cause of the death of this boy was irritating substances in the water that had gone into his lungs and stomach and which set up an inflammation of the linings of the bronchial tubes and of the stomach, which irrita-

tion set up in the stomach caused vomiting, one of the earliest symptoms of this kind of poison. The irritation set up in the bronchial tubes caused the swelling of the tubes and caused the boy to gasp for breath. The doctor further testified that sulphuric acid is a poison of an irritant nature, and that it kills by the irritation it sets up. He testified to examining the body and discovered thereon the evidence of the application of sulphuric acid, and the blisters that were on the boy's person.

The attractiveness of this pool of water is demonstrated by the photograph Exhibit 1 (Rec. 76).

Exhibits 4, 5, 6, 7, 8 and 9, although poorly made pictures, which do not do justice to the situation, nevertheless give an idea of how the tract where this pool was situated was penetrated by roadways, railroad tracks and other passage ways, leading into and through the twenty acres constituting the grounds on which the pool was situated. These pictures also show that these roadways and this pool were very close to other buildings in that part of the city.

This case was tried in the United States District Court at Ft. Scott, Kansas, to a jury on the 9th and 10th of May, 1918. The jury returned a verdict in favor of defendants in error for \$5,000.00. The case was taken to the United States Circuit Court of Appeals, 8th circuit, on a writ of error and was affirmed. The opinion will be found in 264 Federal, page 785.

Plaintiff in error in its statement of facts on page 7 of its brief attempts to belittle the defendants in error

by referring to them as traveling about the country in a "prairie schooner" and again on page 69 of its brief it is stated, "Defendants in error lived the life of nomads, whose home was a prairie schooner, unhitched their horses and resumed housekeeping a short distance from defendant's land, and the next day their two little boys roaming about on defendant's land discovered the water filled basement and lost their lives, either owing to the fact that the water was polluted with chemicals, or because they couldn't swim, probably because of the two reasons, since their rescuers, who could swim, were able to defy the poisonous character of the water." These statements are hardly borne out by the facts. Defendants in error were not living the life of nomads, neither were they keeping house in a prairie schooner. Defendants in error were the parents of three children in July, 1916. The two little boys lost their lives by going in the pool of water in question. Defendants in error had been in the western part of the state of Kansas (R. 93) and were returning to their home at Springfield, Missouri. Mr. Britt had a brother living in Iola whom they stopped to visit on their return to their home (R. 94) and the little boy who was practically dead when taken out of the pool could swim (R. 97).

The statement is made, page 8, of plaintiff in error's brief. "There was no testimony to explain just how the boys met their death." This is not a fair statement of the facts because the evidence discloses exactly how the boys met their death and what caused their death. Dr. Sutcliffe testified (R. 79) that the boy who was

taken out alive and taken to his sanitarium "died the following day, on the 29th, as a result of swelling of the bronchial tubes and gastro intestinal irritation; irritation of the stomach and bowels, which produced an inflammation of the bowels and stomach;" That he made an examination of the water in the pool and found that it contained sulphuric acid. He procured a jug of the water and had an analysis made by Professor Bailey of the State University of Kansas (R. 80). He also testified that sulphuric acid in the water in the quantities found would cause the condition that he found these little boys in, and that the taking of this irritating water into their lungs would cause them to gasp and take in more of it and that it was taking this poisonous water into their lungs that caused their death (R. 81).

Again on page 9 of Plaintiff in Error's Brief is found the statement that sulphuric acid in cakes was dumped into the pit. The record discloses no such testimony and there was no evidence whatever that sulphuric acid was handled in wooden containers. The witness Lee, as heretofore stated, testified that some kind of chemicals were poured out of barrels, but he did not state that sulphuric acid was poured out of barrels. Both he and witness Stockton testified sulphuric acid was drained out of lead pipes into the pool or pit.

We find another statement we contend is not substantiated by the facts in the case, that "the testimony as to the appearance of the water in the basement was conflicting. Some testified it was greasy, and was littered with refuse and discolored. Others that it was clear and

looked like ordinary water." The testimony showed that the pool of water was perfectly clear. It was not discolored or greasy except when the yellowish sediment in the bottom of the pool was roiled. Witness Lee testified, (R. 17):

Q. Was the water clear or not?

A. Yes, sir it was clear on top. Seemed to be kind of a muddy, milky, brown looking sediment in the bottom.

Q. I mean the top of the water, did it appear clear?

A. Yes, sir; the top of it was clear and nice.

Witness Lamer testified (R. 75) that the water was very clear. Dr. Sutcliffe, who examined the pool of water, testified, "and the water appeared very clear," (R. 79). Witness Stockton testified that he passed this pool of water very often on the way to his work and that the water was clear, (R. 86). So it would seem there is no conflict in the evidence as to the water being clear. The only evidence that the water was muddy or greasy was that after the yellowish sediment was stirred then the top of the water would be roiled and apparently greasy.

In plaintiff in error's brief Iola is referred to as a "small town," but at the time of the tragedy it had a population of nearly 10,000 (Sec. 1910 census report).

On page 6 of plaintiff in error's statement we find the following:

"The building itself was sold to William Lanyon, who later removed all the superstructure, leaving the basement and this basement afterwards filled up with surface water which found access to it through a doorway in the basement on the north-east side."

This statement is not warranted by the evidence and originates in the fertile brain of learned counsel for plaintiff in error. There is not one particle of testimony in the record showing that William Lanyon purchased the building or had it dismantled. It is true there was a weak attempt by cross examining the witness Stockton to show that William Lanyon had bought the building.

On pages 84 and 85 on cross examination the witness Stockton was asked:

Q. Do you know who bought the building?

A. The acid building, yes sir.

Q. Who?

A. A man from Chanute.

Q. Was it William Lanyon?

A. My understanding was it was a man by the name of Morris.

Q. Somebody bought the building from the company and were wrecking it?

A. Yes, sir; I also worked for him helping to take this.

Q. What I am getting at, Mr. Stockton, is, you were first there working for the company taking up pipe?

A. Yes, sir.

Q. And those were lead pipes, were they not?

A. Yes.

Q. And when you disconnected them there would be some acid run out?

A. Yes.

Q. But there was not very much at the time in draining out the pipes?

A. In taking out the pipes there was considerable dreaned out in the tank building across the spur right—(interrupted)

Further on page 86 same witness testified:

Q. But this last work you did cleaning up for the company, Mr. Simmons was there for the company?

A. Yes, he was working in the interest of the company.

Q. In charge and control of its business?

A. Yes.

Q. Could he see and observe this acid and stuff in the cellar there?

A. Sure could nothing to hinder anyone from seeing it.

On page 87 witness further testified:

Q. But what work you did around in the yard there you did for Mr. Simmons?

A. Yes.

And on page 88 he further testified that he worked for Mr. Simmons who was there representing the company and that the company paid him for his services.

So this testimony shows conclusively that Mr. Lanyon had nothing to do with the building or grounds and that Mr. Simmons, the company's formen, was there in charge of this work and that witness Stockton was

working for the company and Mr. Simmons had full knowledge of the acid being poured in the cellar.

On page 35 of plaintiff in error's brief we find the following statement "There is no evidence in the record to show what attracted them to the water filled, abandoned cellar. Nor is there any evidence of footpaths leading to the cellar and it certainly was not near their home, which the record discloses was in Springfield, Missouri."

Replying to the first part of this, we think it sufficient to say that it is quite evident the clearness of the water attracted them while they were traveling south on this well traveled road 100 or 120 feet west of the clear, crystal like pool of water, and it being a hot, sultry day in July evidently the clearness of the water attracted their attention and allured them from the well traveled road. Exhibit No. 1, R. 76, is certainly sufficient to show what attracted their attention.

As to the latter portion of the statement above quoted, "And it certainly was not near their home, which the record discloses was in Springfield, Missouri," this is somewhat in conflict with statements which learned counsel make in their brief on page 169, wherein they say, "On the afternoon of July 27, 1916, plaintiffs, who lived the life of nomads, whose home was a prairie schooner, unhitched their horses and resumed housekeeping at a short distance from defendant's land." Now if they resumed housekeeping in their prairie schooner a short distance from defendant's land then evidently the state-

ment above quoted, that the pool of water was a long distance from their home because their home was at Springfield, Missouri, conflicts, for one or the other of said statements is untrue. We presume, however, that in order for counsel for plaintiff in error to carry out their theory and pursue the thought running through their minds at the time the statements were made it was necessary to fix the home of the defendants in error as being at the places named at the same time.

BRIEF, ARGUMENT AND CITATION OF AUTHORITIES.

We find this statement on page 31 of plaintiff in error's brief, "The question in this case is whether a corporation owning a large tract of land on the outskirts of a "small town," which it has ceased using for many years, must at its peril not only keep said premises in such condition that they shall be free from danger to such children as shall enter thereon without its knowledge or invitation express or implied, but must have nothing on said premises that such children can turn into a source of peril by making a use thereof never within the owner's contemplation." We do not believe this is the exact question to be decided in this case. As we understand the question it is, shall the plaintiff in error be required to respond in damages to the defendants in error, the parents of the two boys whose lives were lost on account of their going swimming on a hot July day in the attractive pool of water maintained on plaintiff in error's premises, which pool of water was highly impregnated with sulphuric acid manufactured by plaintiff in error and poured into the pool of water together with other poisons which had been used in the manufacturing of said sulphuric acid and which poison pool of water was allowed by plaintiff in error to remain unguarded upon its premises with full knowledge on its part of the poisons in the water and its dangerous con-

dition after it had dismantled its plant and which pool of water, because of its location, its clear and crystal like appearance, was attractive to the boyish instincts while they were traveling on the premises on a well traveled road within 100 or 120 feet of the pool of water. The pool being attractive to boyish instincts and impulses as a place to go bathing and the boys yielding to such instincts, they went bathing in the pool of water and by reason of their immature years in our view of the law it would be immaterial whether the boys saw or could see the pool before they entered upon the tract.

Whether the invitation was expressed or implied for the deceased boys to go upon the premises is of no great importance for the facts in this case disclosed that the plaintiff in error, with full knowledge of its foreman, left this pool of water there highly impregnated with sulphuric acid and other poisons and this brings it within the rule announced in the turn table, nuisance attractive and the hidden danger cases.

It is stated on page 31 of plaintiff in error's brief that the Circuit Court of Appeals in its opinion (264 Fed. Page 787) admitted the case was a "debatable one." It is not so stated in the opinion. The opinion is a well considered one and is well fortified with authorities. It follows the decisions of this court as well as decisions of many other courts of last resort. The suit was based upon a statute of the State of Kansas giving a right to recover "when the death of one is caused by the wrongful act or omission of another."

The maxim *sic utere tuo ut alienum non ladeas* does not necessarily belong to the class of extra legal principles. It only means "use your own property in such a manner as not to injure that of another."

The plaintiff in error was not using the premises in question for any good purpose and certainly had no legal right to leave this pool of poison water, perfectly clear in appearance, which was an allurements to children of tender years, without any safe guards, fences or warning of danger signs and permitting the public to use the tract for public highways, and in fact to use the well traveled roads and foot paths which the plaintiff in error suffered to be made and used thereon.

The Circuit Court of Appeals was well within the law and facts in this case when it stated (Page 787 of the Opinion) :

"There are many assignments of error, chiefly as to instructions given and refusal to give others, but they all come back to the contention, pressed on argument and developed in brief, of nonliability; and it may be conceded that there is good ground for debate, as the elaborate and able brief for plaintiff in error demonstrates. There is conflict in the cases as to the extent and under what conditions the principle *sic utere tuo, etc.*, may be carried against a landowner as a basis for liability on account of injuries to children resulting from dangerous attractions which he places upon or suffers to continue on his premises. There is less hesitation in its application against him where the thing complained of is, as here, put to no useful, ornamental or other purpose of enjoyment. It is also urged as error that the weight of the evidence disclosed that

the pool could not have been seen by one off the premises standing in the nearest highway, or on the boundary line, or in the paths, and that the court told the jury that it was immaterial whether the boys saw it before they went upon the tract or after they were on it. In this the court doubtless had in mind two things, first, the undisputed fact that the public passed over it at will, so much so as to beat foot-paths across it, the further fact of its nearness to the homes of families, and second, the principle of law applied in cases like this that children of tender years are not classed with idlers, licensees or trepassers."

Citing, 2 Shearman & Redfield on Negligence, 705. In *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep 114.

The undisputed evidence the court refers to is found on R. page 17, witness Lee testified:

Q. Tell the jury whether there was ever any fence, barrier, or protection of any kind placed there after the machinery and buildings were moved away.

A. Has not been. None of any kind.

Witness Lamer testified, R. 75:

Q. You may state if there was any warning sign, any fence, or barrier to prevent anyone going into that place or to warn them of the danger.

A. There were no fences. There were no warning signs.

Q. I believe you said the water was clear, did you?

A. The water was very clear.

Q. At the top?

A. At the top.

Q. Now was there a road running north and south just west of this pool of water?

A. Yes.

Q. About how far west?

A. 100 to 120 feet, approximately, I am not sure as the exact distance.

Q. That is the road that runs west to Claiborn's mill?

A. It is.

Q. It runs north on the west side of the pool?

A. On the west side of the pool, yes (R. 76).

W. A. Wheeler, witness for plaintiff in error and its local representative and agent, testified, R. page 99:

"The road is west of Claiborn's mill. After you get around the mill then turn to the east. There are several roads there that you drive most anywhere west of these tracks, but difficult to get on the east side of the tracks."

On page 100 he testified:

"Could see this pool of water 100, 150 to 200 feet from the west." The witness also testified that he had gone out to this tract of land the day the boys were drowned to look over the paving plant of the Kaw Paving Company which was operating there at the time, (R. 98). That he had had an analyses made of the water from the pool at the request of plaintiff in error (R. 101), and that he had the pool filled up a day or two after the accident at the request of the county health officer.

The photographs Exhibits 4, 5, 6, (R. 104) and 8 (R. 104) show the well traveled roads across this tract. The testimony, however, discloses that Exhibits 4, 5, 6, and 8 were taken after the pool was filled up by Mr. Wheeler. Exhibit No. 1 (R. 76) shows the pool of water in the condition it was the day the boys went in and lost their lives. Exhibit No. 9 (R. 105) shows its condition after it was filled up as testified by Mr. Wheeler.

The Circuit Court in considering the facts in the case took the same view that the trial court and jury did of the evidence. True, the Circuit Court did not consider it in the same light that plaintiff in error did. The court determined that there was an abundance of evidence to sustain the verdict if the law given by the trial court was applicable to the facts. Instead of taking the statements contained in plaintiff in error's brief as to what the facts were, the court undoubtedly read the record for itself and thus determined that the statements contained in plaintiff in error's brief were not borne out by the record.

On page 35 of plaintiff in error's brief we find the following statement: "There was a path 120 feet west of the cellar running north and south, which had been worn by defendant's employees, through the tract. It is equally clear from the evidence that from this path the cellar was not visible." This statement is directly in conflict with the evidence in the record. Instead of its being a worn path it was a well traveled road.

Q. Now was there a road running north and south just west of this pool of water.

A. Yes.

Q. About how far west of that road?

A. 100 to 120 feet, approximately, I am not sure as to the exact distance.

Q. That is the road that runs west to Claiborn's mill?

A. It is.

Q. And runs north by the west side of the pool?

A. On the west side of the pool, yes.

(Witness Lamer's evidence, R. 75-76.)

W. A. Wheeler, plaintiff in error's witness, testified:

Q. Could they see it from the west? (Referring to the pool)

A. At a distance of possibly 100, 150, or 200 feet, might see it from the west (R. 100).

The evidence shows this was a well traveled road 100 or 120 feet west of the pool. The evidence given by witness Wheeler shows the pool could be seen from 150 to 200 feet west of the pool, hence we believe we are justified in saying the statement contained in plaintiff in error's brief that the pool was not visible from this road is in conflict with the evidence in the record. By an examination of the photographs Exhibits 4, 5, 6, and 8, this court will be convinced that the paths referred to are well traveled roads. The exhibits also support the statement of the Circuit Court wherein it mentions the nearness of this tract to the homes of families, etc., for these exhibits show that the tract is near to factories and residences. And the boys while traveling on this road evidently saw the pool of water because something at-

tracted their attention and they went to the pool and went in bathing and as a result of going in the water they lost their lives.

Following these statements just referred to counsel for plaintiff in error criticises the court for saying that the trial court had in mind "the nearness of this tract to the homes of families and the frequency of footpaths across it." The testimony shows that this pool of water was situated just at the outskirts of the east side of Iola.

Counsel for plaintiff in error, however, conclude that because the witness Stockton testified he lived about 80 rods from the pool that this is conclusive that no one else lived nearer the pool. This does not necessarily follow because the exhibits heretofore referred to show mills, factories, buildings and residence in close proximity to the pool of water in question.

Counsel for plaintiff in error very ably and learnedly assault the decisions cited by the Circuit Court of Appeals in support of its opinion but these same decisions have withstood many such assaults and today are recognized as the well settled law of the land governing such cases as the one under consideration. All that they have said does not change the rule of law as in these cases announced and we do not believe we are called upon to say anything to uphold these decisions for they are now beyond question, the well settled law of this court as well as many other courts of last resort, and will hardly be overturned because of the assault made upon them by learned counsel in the instant case. We will, however, as

we continue the discussion of the facts quote from these authorities in order that they may be before you as you read the facts.

Plaintiff in error's assignment of errors contained fourteen specifications of error for the consideration of the Circuit Court of Appeals but had saved exceptions to only six rulings of the trial court and, therefore, the many errors which they assigned were not available and really the only question before that court, as well as this, is whether or not the trial court misdirected the jury as to the law of the case.

The record here discloses the one single question and that is, did the Circuit Court of Appeals err in the law of the case. While the brief contains some criticism of the evidence and that it was insufficient to sustain the verdict rendered, yet this question is not vigorously pressed for the consideration of this court.

We understand the rule to be that where there is some competent evidence to sustain the verdict and the verdict has been approved by the trial court it will not be disturbed by a reviewing court.

We contend this case is governed by the rule of the "turn table, attractive nuisance and hidden danger cases" which is now firmly established by the laws of the State of Kansas as well as by the Supreme Court of the United States. (See *Railway Company v. Stout*, 11 Wall. 657), (*Union Pacific Ry. Co. v. McDonald*, 152 U. S. 262), (*B. & P. Rr. Co. v. Cumberland*, 176 U. S., 232).

The decisions of the Supreme Court of Kansas directly in point in this case are *Roman v. City of Leavenworth*, 95 Kans. 513; *Price v. Water Company*, 58 Kans. 551; *Biggs v. Wire Company*, 60 Kans. 217; *E-I. Company v. Heeley*, 65 Kans. 798; *Harper v. City of Topeka*, 92 Kans. 11; *Kansas City v. Siese*, 71 Kans. 283.

In the last cited case a recovery was permitted because of other dangers connected with the pool or pond of water than the water itself. It is clearly in point with this case. In the case of *Price v. Water Co.*, *supra*, the Supreme Court reversed the trial court and held that a recovery could be had under the facts there stated. At page 554 of the opinion the court said:

"It is, however, contended by the defendant in error that, inasmuch as the deceased was a trespasser upon its grounds, it owed to him no duty to guard against the accident which occurred. Without doubt, the common law exempts the owner of private grounds from obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, or others who go upon them, not by invitation, express or implied, but for pleasure or through curiosity. Cooley on Torts (2d Ed.) 718; 1 Thompson on Negligence, 303; *Dobbins v. M. K. & T. Rly. Co.*, 41 S. W. Rep. 62. The common law, however, does not permit the owner of private grounds to keep thereon allurements to the natural instincts of human or animal kind, without taking reasonable precautions to insure the safety of such as may be thereby attracted to his premises. To maintain on one's property enticements to the ignorant or unwary, is tantamount to an invitation to visit, and to inspect and enjoy; and in such cases

the obligation to endeavor to protect from the dangers of the seductive instrument or place follows as justly as though the invitation had been express."

This pond was an attractive place. The plaintiff in error had knowledge that it contained sulphuric acid and zinc sulphate, which it had left there in sufficient quantities that it was dangerous for anyone to enter therein. And it left no barriers, warnings or danger signals of any kind. This court needs no further proof that it was an attractive place than to examine defendants in error's photograph Exhibit 1 (R. 76). The testimony shows that the water was clear and sparkling, and the boys having no knowledge whatever of the hidden danger, they being of tender years and unable to appreciate the fact had they even known that the pond had once been used as a part of an acid plant, could it then be said they were guilty of contributory negligence or that the plaintiff in error would not be liable for their death as shown by the testimony in this case?

The evidence of W. A. Wheeler who was called as a witness on behalf of the plaintiff in error testified concerning the roads as follows (R. p. 100):

Q. Could they see it from the west? (Referring to the pool).

A. At a distance of possible 100, 150, 200 feet, might see it from the west.

And Prof. Lamer testified (R. 76) as heretofore set out:

"That this road was 100 or 120 feet west of the pool."

Therefore, this pool of water could readily be seen by the boys while they were on this well traveled road, running north and south west of the pool.

The rule we are contending for is upheld in the very recent case of *Heller v. New York N.H. & H.R. Company*, 265 Federal, page 192. We quote the 6th syl:

"The 'turntable doctrine' requires the owner of premises not to attract or lure children into unsuspected danger or great bodily harm, by keeping thereon attractive machinery or dangerous instrumentalities in an exposed and unguarded condition, and where injuries have been received by a child so enticed the entry is not regarded as unlawful, and does not necessarily preclude a recovery of damages; the attractiveness of the machine or structure amounting to an implied invitation to enter."

Again in the case of *American Ry. Express Co. v. Crabtree*, 271 Federal, 287, it was held the Express Company was liable for carelessly causing the death of an eight year old child by leaving a wheel tilted against the wall in such a way that children could set it on edge and play therewith, but also holding that it would not be negligence if the wheel had been tilted so far that it could have been straightened up only by an adult; thereby ruling the law to be the same as given by the trial court in his charge to the jury in the instant case, that the plaintiff in error under the facts in this case was liable for the death of these little boys of inexperience and immature age although it would not be liable for the death of an

adult person if such person had gone into the water and lost his life.

Counsel cite several decisions from other states and our judgment is that these are not controlling and not even applicable to the facts in the case. Even though we concede that the boys were trespassers, which they were not, the plaintiff in error would be liable. We claim they were not trespassers because of their tender age and because the plaintiff in error maintained three well traveled roads over its premises, which were as many invitations to the public and these boys to enter, and if they did they would encounter no danger.

We call attention to the case of *Paolano v. McKendall*, 24 R. I. 432, where it was held that the land owner did not owe any duty to a licensee save that he should not knowingly let him run upon a hidden peril, or wilfully cause him harm. Plaintiff in error permitted this pool to remain there for years with the water impregnated with these deadly poisons. It certainly constituted a hidden peril or danger. See also the case of *Hobbs v. Blanchard & Sons Co.*, 74 N. H. 116, where it was said:

"A trespasser upon premises who does not know of the presence of an unnecessary hidden danger thereon, and is in no fault for not knowing of such presence, need not conduct himself as though he was informed of the danger, to relieve himself of a charge of contributory negligence."

In the case of *Scheuerman v. Scharfenberg*, 163 Ala. 337, the court said this:

"The owner of premises is liable to persons lawfully coming thereon for injury occasioned them by unsafe conditions which he has intentionally or negligently suffered to exist without warning, such as pitfalls, spring guns, and the like."

The plaintiff in error invited the traveling public, as well as the Britt boys, to go upon its premises by permitting it to remain unfenced and the roads to be used by anyone who desired to cross and re-cross at will and this amounted to an invitation to these little boys to travel this well traveled road that ran north and south just west of the pool of water in question.

In the case of *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301, the rule defendants in error are contending for is established beyond doubt. In the first syllabus of the case, it is said:

"If the premises are open and unguarded, and the public is permitted to cross and to be upon them at will, the land owner owes to every person coming thereon the duty to abstain from injuring him intentionally, OR BY FAILING TO EXERCISE REASONABLE CARE, but does not owe him the duty of active vigilance to see that he is not injured while on such premises for his own convenience."

Not only is the plaintiff in error liable under the rule well established by the "Turn Table" cases, but upon another principle of law, and that is the "hidden danger" cases. The pool of poison water standing on the premises of the plaintiff in error as shown by the testimony in this case and admitted by the plaintiff in error's witness Frielbel, and must have been known by its foreman, Sim-

mons, and hence it must be regarded and held by this court that the poisons contained therein were as much of a hidden danger and as fatal a death trap in its result as a setting of a spring gun; and hence would come under the rule announced in the case of *Palmer v. Gordon*, 173 Mass. 410.

Anyhow the plaintiff in error maintained three well traveled roads on its premises, and permitted them to be used by the traveling public as shown by its Exhibits 4, 5 and 8; and the plaintiff in error permitting these well traveled roads across its premises extended an invitation to these children as well as others to use them at will. They saw this pool of sparkling, clear and apparently wholesome water while traveling on one of these well traveled roads.

The evidence disclosed that plaintiff in error left this pool or pond of water, in appearance entirely pure, wholesome and proper for such use as bathing. They abandoned the premises and left the poisonous pool of water entirely unguarded, unprotected and unwarned. These boys, who were of tender years and had no knowledge of the hidden dangers contained in this pool of poisoned water, ventured in and lost their lives as a result thereof.

The statute of the State of Kansas under which this action was brought and prosecuted is as follows:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an

action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

"That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section may be brought by the widow or where there is no widow, by the next of kin of such deceased" (7323, 7324, Gen. Stat. Kan. 1915).

The defendants in error under the facts of this case could maintain this action under this law without the appointment of a representative because the testimony shows that they were residents of Springfield, Missouri, at the time the action was brought. Van Britt testified (R. 93) of the record:

Q. In the summer of 1916 where did you live and where had been your home prior to that time?

A. Well, I have always made my home in Springfield, Missouri.

There is not a particle of evidence to contradict this and the trial court and jury believed it.

DID THE PLAINTIFF IN ERROR LEAVE THIS POND OR POOL OR WATER IMPREGNATED WITH SULPHURIC ACID?

Geo. W. Lee, now an engineer for the Prime Western Spelter Co., a witness for defendant in error, testified as follows at page 14 of the record:

Q. Did you ever work for the defendant, The United Zinc & Chemical Company?

A. Yes, sir.

On page 15 and 16 he testified:

Q. Who was the last foreman or representative of the company there?

A. John Simmons.

Q. Did you work under Mr. Simmons a while?

A. Yes, sir.

Q. Was he the last man that was there for the defendant company when all the machinery and stuff was taken away?

A. So far as I know he was.

Q. When this machinery and stuff was being moved away or the buildings being torn down as you have stated, you may tell the jury whether or not any sulphuric acid was poured into that pit where these towers and machinery was?

A. Yes, sir; it was.

Q. Do you know whether there was or not?

A. Yes, sir; I saw it poured in there.

WERE THERE ANY FENCES, BARRIERS, OR DANGER SIGNALS AROUND THIS POOL OF WATER?

The testimony of the witness Lee on page 17 of the record is as follows:

Q. You may tell the jury whether there was ever any fence, barriers or protections of any kind placed there after the machinery and buildings were removed?

A. Has not been one of any kind.

Q. Have you passed that place frequently since the buildings have been torn down?

A. Yes, sir.

Q. Tell the jury whether or not later it filled up with water?

A. Oh, yes, filled up with water.

Q. Have you examined it or rather looked at it as you have passed it frequently?

A. Yes.

Q. Was the water clear or not?

A. Yes, it was clear on top. Seemed to be kind of muddy, milky brown looking sediment in the bottom.

Q. I mean the top of the water did it appear clear?

A. Yes, sir; the top of it was clear and nice.

On page 16 the same witness testified that to the best of his judgment plaintiff in error had dumped about 100 barrels of this stuff in this pond as it looked to him. On page 19 he testified that this stuff which the plaintiff in error poured in the basement would eat his hands, flesh and clothes, and he had to wear rubber pads when handling the machinery.

Defendants in error produced the witness, A. A. Stockton, who had worked for the defendant company and was the last man to do any work for it in cleaning up after the buildings and machinery had been removed. On

pages 83 and 84 of the record, on direct examination, he testified as follows:

Q. Did you ever work for the United Zinc and Chemical Company, when they were operating their plant here?

A. Yes, sir.

Q. How long did you work for them?

A. Well, all told I guess I worked something like a year.

Q. Did you work for them after the plant had ceased operating and while it was being dismantled?

A. Yes, sir.

Q. Did you do the last work that was done there about the acid pit or plant?

A. Yes, sir.

Q. For the defendant company?

A. Yes, I cleaned up and did about the last work there.

Q. What was the last work you did there?

A. The last work I done was shooting out some casting out of the cement piers the tower set on for the building.

Q. Who did you do that work for?

A. The defendant company.

Q. Who was the foreman there in charge of that work?

A. Right at that time Mr. John Simmons was looking after the company's interest.

Q. That was the cleaning up of their work there?

A. Yes.

Q. Was any of that work you done near the acid basin or cellar?

A. Right around it and over it, right around the basement.

Q. You may tell the jury now when you were doing that work, cleaning up there for the company as you have just stated, if you observed any sulphuric acid in this pit or basin?

A. Well, it was dreaning in there more or less all the time from different directings where we were taking up a lot of lead piping.

Q. Lead pipe that had been used in connecting—

A. (interrupting) Lead pipe connecting—that lead across the railroad track spur to the tank building where they loaded in the tanks from the cars.

Q. And were those pipes leading into the basement?

A. They did lead into the basement, they were taken out when I was working there.

Q. You mean to say this acid dreaned out of these pipes as being removed?

A. They had been removed when I was cleaning up or doing the last work there.

Q. Now, they manufactured sulphuric acid there, did they?

A. That was what they claimed to do.

Q. Did you see it?

A. Yes, I seen it, but I ain't much acquainted with that kind of business.

Q. Was there any of the sulphuric acid dreaned out of these pipes into the pit, and was it there when you quit cleaning up?

A. Lots of it.

And again on re-direct on pages 86, 87 and 88, he testified:

Q. But this last work you did cleaning up for the company, Mr. Simmons was there for the company?

A. Yes, he was working in the interest of the company.

Q. In charge and control of its business?

A. Yes.

Q. Could he see and observe this acid and stuff in the cellar there?

A. Sure could, nothing to hinder anyone from seeing it.

Q. Mr. Stockton, how far do you live from this pool of water?

A. About eighty rods, I think.

Q. Which way?

A. Northwest.

Q. Have you frequently passed this pool of water and seen it since the buildings were removed?

A. Oh, yes, very often.

Q. Tell the jury, describe it at the different times you passed it and saw it?

A. I couldn't have much idea of the different times.

Q. Describe its appearance to the jury, whether the water was clear or not?

A. I passed it there when it would be full up to the top of the wall and be clear, and then I have passed it when it was not more than half full, different times; I live close by and frequently down past there.

Q. But the last work you did there in shooting these castings out, as you stated, and cleaning up, who did you do that work for?

A. That was done for Simmons, the last work I

done was taking the castings out of the cement piers.

Q. Was that after the towers had been taken down?

A. Yes, sir.

Q. That was the last work you done?

A. That was the last work I done.

Q. Who paid you Mr. Stockton?

A. The company paid me.

This testimony proves beyond any question that the plaintiff in error knew that it was leaving a great quantity of poison in this pool and on this testimony alone the court was abundantly justified in giving the instruction complained of.

THE APPEARANCE OF THE WATER.

Witness Hufferd testified, R. 44:

Q. Had there been several in before you got there?

A. Yes, sir, six or seven when I got there.

Q. Now, you say roily at that time, just explain how it was roily?

A. Well, it looked like, oh, just kind of a yellow like, like grease on top of the water kind of yellowish looking stuff.

Q. Had you been there before?

A. Yes, sir, I had been to this pit before.

Q. When?

A. Well just a short time before these boys got drowned.

Q. Did you observe the water then?

A. Yes, sir.

Q. Was it clear or not at that time?

A. Well it was clear, yes, but you could see sediment around the offset, you could see the stuff in the bottom of it.

Prof. Lamer testified that he went to this pool a day or two following the death of these boys to assist his brother-in-law, Dr. Sutcliff, to obtain a jug of this water for an analysis, and in answer to a question as to the appearance of the water on page 74 in part said:

"It was very clear and on the bottom of this pond was a sediment or precipitate, yellowish in appearance."

Mr. Stockton testified on page 86 of the record in answer to a question as to the appearance of the water whether clear or not, as follows:

"I passed it there when it would be full up to the top of the wall and be clear; and I have passed it when it was not more than half full. Different times; I live close by and frequently go past there."

So it will be noticed from the evidence here quoted from the different witnesses that the water when not disturbed was perfectly clear as pled in defendants in error's petition.

On page 9 of plaintiff in error's brief they criticise the testimony of the witness Geo. W. Lee and say his testimony is unreasonable and should not be believed. This would have been a good argument to make to the jury, but it does not avail the plaintiff in error anything

to argue it here. They seem to forget the jury were the triers of the facts and the trial court saw the witnesses and heard and believed their testimony and approved the verdict and it is conclusive here.

On pages 9 and 10 of plaintiff in error's brief counsel discuss the testimony of Mr. Friebe, a witness for plaintiff in error. This testimony was submitted to the jury under proper instruction and a sufficient answer to all that is said concerning this testimony, is that neither the trial court nor the jury believed him.

It is stated in plaintiff in error's brief that defendants in error did not prove that the boy taken out alive could swim. We wonder what difference this would make. It is certain he did not die from drowning. He was taken out alive and lived until the next day. So what good purpose would have been served to have shown that he could swim? It was competent and proper to show that the one taken out dead could swim (R. 97) and could have protected himself in ordinary water, and that his death was caused not from drowning, but because of his being overcome by the poison in the water.

It is stated in plaintiff in error's brief (page 11) that other parties went in the pool of water to rescue these boys and remained there from three to fifteen minutes and received no permanent injuries. It is admitted that they did not die as a result of going in this poisonous water, but let us see what these witnesses say. Witness J. M. Brown, who went to the rescue of these boys and went in the water, testified as follows. (R. 25) :

Q. What effect did it have on your body or any portion of your body?

A. Why, I was unable to sleep at all the first night and will say I was at least two weeks recovering from the effects of the experience I had.

And continuing on page 25 as follows:

Q. Did you suffer any as a result of going in that water, I don't mean the injury to the foot or leg, but by reason of coming in contact with the water?

A. Yes, sir.

Q. Now just tell how it affected you and in what way?

A. Burning sensation, very burning to me.

Q. How long did that burning sensation continue?

A. I would say week or two before fully recovered from it, and seemed to put poison in that sore. it was very painful.

* * *

Q. Now you say you didn't sleep any the first night?

A. Not any, no.

Q. What was the reason, after being in that water?

A. Because of the pain in my head and eyes, it didn't get in my eyes but around the lids, so painful kept me walking the floor all night.

Ernest Dalton, another witness who helped to take these boys out of the bond, testified (R. 32) as follows:

Q. What effect did that have on you, Mr. Dalton?

A. Well, different ways, choked me; when got out the water could hardly get my breath, and wasn't able to go back in after the other.

Q. Did you get any in your mouth or nostrils?

A. I did.

Q. What effect did it have?

A. About like it would to eat an Indian turnip, burned.

Q. Did it smart and burn?

A. Yes, sir.

Q. You may state what effect it had on the body during that day and night?

A. Burned all that day and that night, too; and I bathed in soda water and kind a stopped a little bit.

Q. How long did you notice the effect?

A. Oh, it burned for quite a while, a month, I guess, something like that, noticed burning a little now and then.

Q. Get any in your eyes?

A. I did.

Q. What effect did it have on your eyes?

A. Well, burnt pretty bad, don't know, and hurt them so bad; burnt pretty bad, couldn't look at anything very long.

Q. Get any in your ears?

A. Didn't notice any in my ears.

Q. Now you say you got some in your mouth, you may state what effect it had on your tongue and your lips and mouth?

A. Made my tongue and lips awfully sore.

And on R. 33 he further testified:

Q. Did you go home after that?

A. Went home soon after taken the boys away.

Q. What for?

A. Went home to get the clothes off, see if I could stop that burning.

Q. Now, you say it almost smother you, tell the

jury how it affected your breath or wind?

A. When I went under I guess I had my mouth open, and it strangled me, couldn't breathe for quite a little bit after I come up.

Take Lee one of the witnesses who went into this pool of water to help rescue these boys, in answer to question as to what effect the water had on him, testified as follows, (R. 38):

Q. Well, what effect did the water have on you, if you discovered any?

A. Well, it hurt my eyes and my lips peeled off, whether caused from the water or not I don't know, but they peeled off anyhow.

Another witness, Arthur Burnett, testified that he was also in the pool of water assisting to take the boys out, but stated he did not go in the deep part because he knew there was acid in there, and then testified on page R. 55 as follows:

Q. How long were you in there?

A. Probably three or four minutes; long enough to help pull one of them out.

Q. What effect did that water have on you, if any?

A. Just itched and burned.

Q. Did you have your clothes on?

A. Yes, sir, left mine on.

And on R. 56 he said:

Q. Now, to what extent did it itch and burn you, and what part of your body did it affect?

A. Just what part was in the water.

Q. How deep was the water where you went in?

A. Probably a foot.

This testimony together with the expert testimony of Dr. Sutcliff, Prof. Bailey and Prof. Lamer was sufficient to show the water was highly poisoned with sulphuric acid and zinc sulphate as pled in the petition.

In addition to this we call your attention to the condition of the oldest boy who was taken out alive. The witness, Ernest Dalton, (R. 31) testified:

Q. You may state what you did after you got him out—whether worked with the boy or not.

A. The first one?

Q. Yes.

A. No, never worked with the first one: just fished him out, set him on the bank and set there awhile and threw up a little and seemed to be all right a little bit, alive and everything.

Q. Did you say he vomited?

A. Yes.

Witness Jake Lee (R. 38) testified:

Q. The first little boy taken out, did he vomit?

A. Yes, sir, he did.

Ernest Hufferd testified he was afraid to go in; heard there was acid in it and in R. 43 said:

Q. Did you observe any burns or blisters on his mouth or face or any place?

A. Well, I could see red spots on his body, don't know what it was caused from.

Q. Just describe the red spots, what they looked like.

A. Well, looked like sun burn, just red in spots.

Q. Different spots over the body?

A. Yes, sir.

And further on same page he stated:

Q. Did you see the little boy that was yet alive?

A. Yes, sir, talked with him.

Q. Pay any particular attention to him particularly?

A. Well, was talking to him when sitting on the bank.

Q. Did he vomit any?

A. Yes, sir.

Q. Did he appear to be conscious and all right?

A. Well, he was not when he first come out, vomited, talked for five minutes anyway after he came out.

A. R. Sleeper, who was the undertaker, testified on behalf of the defendants in error (R. 71 and 72) as follows:

Q. Just describe to the jury the condition the body was in as to there being burnt places, sores, blisters or blemishes? What ever you call them, on the body?

A. Well, the boy had several sores you might call them, or blisters, on his body; they were small, about the size of a thumb nail, or something like that, is my remembrance of them. He had them on his shoulder, as I remember it now, there was also a place on his right knee that I recall as I examined that one, remember that one in particular.

Q. Now, did those places appear of recent origin or were they old sores?

A. No, they were new sores, not old.

* * *

A. The boy was laying there on the bed and he

was asking his father to do something for him.

Q. Was he giving any evidence of pain or suffering?

A. Yes, had what I call convulsions.

Q. Describe to the jury what he would do?

A. He would all tie up in a knot and gasp for his breath, he couldn't get his breath. And he would have those convulsions lasting for a minute or two and then he would relax and lay there and seem to be normal and then he would go into a convulsion again.

Prof. Lamer testified on behalf of the defendants in error (R. 75) after stating he, together with Dr. Sutcliff, obtained some water from this pond, as follows:

Q. Did you taste this water or make an examination of it?

A. Superficial examination of it, yes.

Q. Have you had any special training or experience as a chemist?

A. I have.

Q. To what extent?

A. I hold degrees from the University of Kansas and Yale College.

Q. Now tell the jury what tests or experiments you made with this water.

A. Superficial tests of the sample showed zinc sulphate and sulphuric acid in appreciable quantities, to what extent I do not know.

Q. You did not make a thorough test?

A. I did not, not equipped for quantitative work at all, only a superficial test.

Mr. McClain: If the court please, we ask this to be stricken out as a conclusion of the witness.

The Court: No, he said he made no quantitative analysis because not equipped to do so, but he said it was there.

Mr. McClain: As I understood the witness he said he made only a superficial test.

The Court: As I understood you to say, there was sulphuric acid in this water?

A. In appreciable quantities, yes, sir.

The Court: Let it stand.

Q. Now, are these poisons, do you know?

A. Zinc sulphate is a poison, all the soluble salts of zinc are poison; sulphuric acid is a corrosive.

Dr. Sutcliff testified that both these boys came to their death by reason of being poisoned as a result of coming in contact with the water in this pool. His evidence will be found on pages 78 to 83 of the record.

Prof. E. H. S. Bailey, who has been Professor of Chemistry at the State University of Kansas for thirty-four years, testified on behalf of the defendants in error that he had made a quantitative analysis of the water taken from this pool and that it contained deadly poisons, both sulphuric acid and zinc sulphate to such an extent that it would be dangerous to human life for anyone to go bathing in the pool from which this water was taken. His testimony is brief and will be found on pages 88 and 92 of the record. A portion of the evidence of Prof. Lamer, Prof. Bailey and Dr. Sutcliff is set out in the statement of facts and hence we will not quote further from it here.

We believe this is sufficient to show that the court was justified in giving the instruction complained of.

See *Clark v. Powder Co.*, 94 Kan. 268.

There was no exception taken and there is none shown in the record to the court's refusal to give the instructions requested. We challenge counsel for plaintiff in error to show in the record where any exception was saved to the court's ruling refusing to give the instructions requested.

We do not understand this court hunts for errors in the record, which have not been properly saved and pointed out. It is not sufficient to challenge the charge given by the court as a whole, but there must be a challenge to each and every separate instruction and the reason for said exception must be noted. In the case of *Lincoln Savings Bank, etc. Co. v. Allen*, C. C. A. 82 Fed. Rep. 148, it was said:

"The fact that portions of the charge challenged were given and that exceptions were taken to them must be established by a bill of exceptions settled and signed in accordance with this act before a Federal Court can find the error and reverse the judgment."

Citing 159 U. S. 590.

Oraget v. U. S., 126 U. S. 240.

Mussina v. Carrasos, 6 Wall. 365,

Blake v. U. S., C. C. A. 71 Fed. R. 286.

While plaintiff in error assigns and argues as one of its errors the overruling of its motion for a directed verdict it will be noticed that no exception was ever taken to this ruling. The only place it appears in the record is on

page 128, being the first instruction requested by the plaintiff in error, to the refusal of which no exception was taken, and then in the journal entry at page 147, and no exception was taken or saved.

Before concluding this brief we desire to call the court's attention to the fact that the photographs taken by the plaintiff in error, were taken at the outer edge of the 20 acre tract of land the purpose being, if possible, to show that it did not contain allurements and was not enticing and evidently with an intent to break the force of defendant in error's testimony that the pool was an inviting place. However, an examination of defendants in error's Exhibit No. 1 (R. 76 A) will show for four or five hundred feet surrounding the pond its actual condition, therefore, these photographs and exhibits carry no weight as evidence that the pool and grounds immediately surrounding it were not an inviting and attractive place. They do serve the purpose, however, of showing the well traveled roads across the 20 acre tract. And in this connection we again desire to call the court's attention to the evidence of witness Wheeler, produced by the plaintiff in error who testified (R. 99) :

"That road is west of Claiborns' mill, after get around the mill turn to the east. There are several roads there that you drive most anywhere this side of these tracks, but be difficult to get on the east side of the track."

However, when the court examines the whole record it will find an abundance of competent and convincing testimony to warrant the instructions given by the court

and to sustain the verdict rendered by the jury. It being a question of fact, where a proper charge was given, and the verdict approved by the trial court, who saw the witnesses, observed their manner and demeanor upon the witness stand, and who was abundantly able and competent to judge as to the credibility of the witnesses, and the evidence showing that these little boys lost their lives by the wanton and wilful conduct of the plaintiff in error, its gross carelessness and negligence in leaving this poisonous pool of water unprotected and unguarded, without danger signals, makes it one of the clearest of cases, under the law and facts, as well as one of the saddest with which we have ever had to deal.

Counsel for the plaintiff in error argue that it had no actual notice or knowledge of the poisons in the pool of water. The evidence which we have heretofore quoted shows conclusively that their foreman, Mr. Simmons, and Mr. Frieble, knew the sulphuric acid was emptied in this place from the lead pipes and tiles when the building was dismantled. They knew that the grounds around this place were saturated with sulphuric acid and other poisons and they left it in this condition. They knew, or by the exercise of reasonable care could have known, these poisons would continue to exist there for many years, and yet they permitted it to remain in this condition without any warning, danger signs or barriers, and permitted the public to cross and recross these premises using the road and pathways thereon, and under these facts we think the argument is hardly consistent with the facts and we know it is not convincing.

In conclusion we wish to say that the opinion of the Honorable Circuit Court of the Eighth Circuit affirming the judgment of the trial court (264 Fed. 785) is so well supported by decisions of this court, as well as decisions of many other courts of last resort, that anything we might say would add nothing to its weight and the reasons given in the opinion for the conclusions reached will carry much more weight than anything we might say, therefore we are willing to submit it to this Honorable Court without further argument for its consideration.

Before closing it seems proper that we should say that if the argument of learned counsel for plaintiff in error is heeded and the rule contended for is adopted, it means a complete overturning of the former decisions of this court and of the decisions of the State of Kansas governing the law in such cases as this and instead of putting a "quietus" on the question as requested in plaintiff in error's brief it will be in direct conflict with the fixed law of the land and create such an uncertain condition that no one would be satisfied except plaintiff in error and its counsel.

We, therefore, most earnestly pray the affirmance of the judgment of the district court of the State of Kansas and the decision of the Circuit Court of Appeals in this case.

All of which is most respectfully submitted,

F. J. OYLER,

FRED ROBERTSON,

Attorneys for Defendants in Error.